Supreme Court, U.S.
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No. 10-___

IN THE

Supreme Court of the United States

RICHARD A. TROPP,
ON BEHALF OF HIMSELF AND ALL OTHERS
SIMILARLY SITUATED,

Petitioner,

v.

CORPORATION OF LLOYD'S,
ALSO KNOWN AS THE SOCIETY OF LLOYD'S,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Uniform Foreign Money-Judgments Recognition Act, as applied by New York and other jurisdictions, consistent with the requirements of the Due Process Clause?
2. Under what circumstances is a forum selection clause in an international contract rendered unenforceable in federal court due to limitations on the availability of a remedy in the foreign forum selected?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard A. Tropp respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-5a) and the district court (Pet. App. 6a-54a) are unreported.

JURISDICTION

The court of appeals entered judgment on July 19, 2010. Pet. App. 1a. The court denied rehearing on November 12, 2010. Pet. App. 151a. On January 21, 2011, Justice Ginsburg extended the time for filing the petition through April 11, 2011. No. 10A721. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides, in relevant part:

> [N]or shall any person be . . . deprived of life, liberty, or property, without due process of law. . . .

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

New York's statute governing the recognition of foreign judgments, N.Y. C.P.L.R. §§ 5301 *et seq.*, provides in relevant part:

> **§ 5302. Applicability**
>
> This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.
>
> **§ 5303. Recognition and enforcement**
>
> Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.
>
> **§ 5304. Grounds for non-recognition**
>
> (a) No recognition. A foreign country judgment is not conclusive if:
>
> 1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> 2. the foreign court did not have personal jurisdiction over the defendant.

(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if: * * * *

4. the cause of action on which the judgment is based is repugnant to the public policy of this state; * * * * .

STATEMENT OF THE CASE

This case arises from a series of extraordinary actions taken in the United Kingdom in response to a financial scandal involving the insurance market Lloyd's of London. *See generally, e.g.*, Courtland H. Peterson, *Choice Of Law And Forum Clauses And The Recognition Of Foreign Country Judgments Revisited Through The Lloyd's Of London Cases*, 60 LA. L. REV. 1259 (2000); MARTIN MAYER, RISKY BUSINESS: THE COLLAPSE OF LLOYD'S OF LONDON (1995); ADAM RAPHAEL, ULTIMATE RISK (1994).

In the face of litigation seeking to hold Lloyd's responsible for billions of dollars in insurance losses, incurred as a result of an alleged Ponzi-like scheme in which Lloyd's participated, Lloyd's was permitted by the U.K. courts to force a market restructuring under which: (a) it required market participants (known as "Names") to purchase reinsurance from an entity Lloyd's created and controlled; (b) Names were required to immediately pay a reinsurance premium as calculated by Lloyd's, without any opportunity to contest the existence or extent of their liability for the reinsured debt; and (c) although nominally afforded a post-deprivation hearing, the Names were allowed to challenge their alleged liability, or Lloyd's' calculation of its amount, only if they could show Lloyd's had engaged in fraud.

Such a system would be unconstitutional if implemented in the United States, violating the Due Process Clause by precluding the defendant from having a fair opportunity to contest the allegation of liability. *See Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S.*

California, 508 U.S. 602, 626 (1993). This petition presents the questions whether a judgment obtained against an American Name under such a system overseas may be enforced by an American court, consistent with the Due Process Clause, and whether a forum selection clause purporting to require Names to adjudicate their claims against Lloyd's under this U.K. system is enforceable in federal court.

I. Factual Background

A. Organization of Lloyd's Insurance Market

Respondent Lloyd's Corporation organizes and regulates insurance underwriting in London. Pet. App. 10a. Lloyd's does not itself issue insurance. Instead, individuals and corporations, called "Names," insure risks through ad-hoc syndicates in the Lloyd's market. Complaint ¶¶20-34. In exchange for a portion of the syndicate's profits, each Name is personally liable for his proportionate share of any losses, without limitation. Each Name has a "Members' Agent" who enrolls the Name in particular syndicates, which are run by "Managing Agents." Pet. App. 11a. The Managing Agents, in turn, elect Lloyd's governing council (usually electing Managing Agents to the council), which is given responsibility under U.K. law for regulating the market. *See id.* 10a n.4; Complaint ¶55, 79. Lloyd's thus controls the market, but is itself controlled by major market insiders.

In order to become a Name, investors must sign various contracts, including the "General Undertaking," which, among other things, provides that the Names agree to comply with current and

future Society bylaws. Pet. App. 13a. Names must also agree to a forum selection clause:

> [T]he courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's.

Pet. App. 32a-33a.

Traditionally, each syndicate underwrites insurance for one year, and then remains open for two additional years to resolve any claims. At the end of the third year, the syndicate is closed and profits or losses are calculated. Pet. App. 11a.

B. Origins Of The Lloyd's Crisis

In the 1970s and 1980s, some Lloyd's syndicates issued long-term insurance for, among other things, environmental liabilities. Complaint ¶123. Although the period of insurance coverage was only a year, the syndicate would remain liable indefinitely for any loss arising from that time period, even if it did not manifest for decades. Nonetheless, in order to close out syndicates in the traditional three-year time frame – allowing Names and their Agents to take their profits at that time – Managing Agents would purchase reinsurance for the remaining exposure. Pet. App. 11a-12a. During the 1980s through the middle 1990s, Managing Agents routinely reinsured long-tail liabilities with other syndicates, often with other syndicates run by the same Managing Agent without arm's-length negotiation of the premium. Complaint ¶50-59.

Asbestos and other environmental judgments in the United States eventually resulted in billions of dollars in losses covered by Lloyd's syndicates. Pet. App. 16a. However, because the losses accrued slowly at first, the scope of the syndicates' impending losses was not immediately publicly apparent. In the meantime, the toxic policies were being continually handed off from one syndicate to another, ticking time bombs that would eventually explode in the hands of whatever syndicate was unfortunate enough to be holding the policy when the scope of the liability became widely known. *Id.*

The management of Lloyd's was aware of the looming crisis long before the market. *See* Complaint ¶¶12, 53-59; Pet. App. 25a. Instead of disclosing what it knew, Lloyd's undertook a massive recruitment effort to bring in new Names (with whom to share the impending losses), many from the United States. Complaint ¶¶56-58. Lloyd's reduced its previously stringent means test to a point where middle class individuals could become Names by taking out a letter of credit against their retirement savings or the equity in their homes. *See id.* ¶¶12, 61. Meanwhile, Lloyd's insiders were extricating themselves from toxic syndicates, passing those inevitable losses along to the new crop of unsuspecting Names. *Id.* ¶¶12, 55-58.

C. Petitioner's Involvement With Lloyd's

At the time of his recruitment by Lloyd's in 1987, petitioner Richard Tropp was a long-time public servant, most recently working for the U.S. Agency for International Development. Pet. App. 12a. Although of modest means, he was able to use his

savings to secure a $160,000 letter of credit and become a Name under Lloyd's recently reduced means test. *Id.* 12a-13a.

Earlier in his career, Tropp had worked at the Environmental Protection Agency. As a consequence, he was only too aware of the risk of insuring environmental and other long-tail liabilities. He therefore repeatedly instructed Lloyd's and his Members' Agent – orally and in writing – that he would not consent to being placed in any syndicate that insured any such liability. Pet. App. 14a & n.17. Given his limited means, Tropp also took care to purchase through his Members' Agent stop-loss insurance that would pay any liability he might incur above a specified amount. *Id.* 14a.

Tropp's first year, 1988, proceeded normally, which led Tropp to agree to participate in syndicates the following year. "In April, 1990, however, things began to unravel." Pet. App. 14a. After having placed Tropp in a number of syndicates for the year, his Members' Agent returned Tropp's check for stop-loss insurance, claiming that it was no longer available. This, in fact, was a lie. The directors of the company that acted as Tropp's Members' Agent – all Lloyd's insiders with their own syndicate investments – had purchased stop-loss insurance for that year for themselves. *Id.* 14a-15a.

Tropp immediately attempted to stop any further underwriting. He called his Members' Agent and orally resigned from Lloyd's for the following year. Pet. App. 15a. Even though the oral resignation was tendered eight months before – and followed up with a written resignation more than four months before – the end of 1990, Tropp's Members' Agent refused, on

Lloyd's' behalf, to accept it, falsely stating that Lloyd's required a resignation in writing at least six months in advance. Tropp was then placed in syndicates for 1991 without the protection of stop-loss insurance. *Id.* 15a-16a.

To make matters worse, Tropp had been placed in numerous syndicates exposed to precisely the long-tail environmental risks he had specifically told Lloyd's and his Members' Agent he would not consent to underwrite. Those syndicates quickly began running up huge losses. A forensic accountant later determined that "98-99% of Tropp's alleged losses stemmed from his being placed in syndicates which, *ultra vires* of his entering prohibition, were exposed to environmental risks." Pet. App. 17a.

D. Reconstruction And Renewal

By 1991, the scope of the crises became public. The toxic syndicates stopped reinsuring and were held open, leaving the Names personally liable for billions of dollars of claims into the foreseeable future. *See* Pet. App. 16a. Many Names were financially ruined; some committed suicide. *See* Raphael, *supra*, at 7-8; Julian Barnes, *The Deficit Millionaires*, THE NEW YORKER (Sept. 20, 1993).

Others sued Lloyd's and their Members and Managing Agents. In response, Lloyd's developed a plan – called "Reconstruction and Renewal" or "R&R" – to stabilize the market, extract itself and its agents from liability for what they had done, and allow Lloyd's to represent to investors that it had cleared its balance sheet of the liabilities. Pet. App. 18a-19a & n.33; Complaint ¶84.

First, Lloyd's created an entity called "Equitas" to reinsure all of the open syndicates from 1992 and earlier. Lloyd's then calculated a reinsurance premium, purportedly based on a calculation of each Name's current and projected future losses. Finally, Lloyd's paid Equitas a small portion of the calculated premium (pennies on the dollar) in exchange for an assignment of the right to collect (and keep for itself) the full face value of the premium from the Names. Pet. App. 18a-19a; Complaint ¶¶89, 146.

The R&R Contract effectively prevented participating Names from contesting their liability for the prior syndicate losses or the calculation of their reinsurance premium. A so-called "pay now, sue later" provision required participating Names to immediately pay the Equitas premium without any right to a setoff based on any debt Lloyd's might owe them (*e.g.*, stop-loss insurance). Pet. App. 22a. Simultaneously, a "conclusive evidence" clause provided that Lloyd's assertion about the proper amount of the Equitas premium was conclusive evidence of the extent of the debt, absent a showing of "manifest error," *id.*, construed to include only mathematical errors or other similar mistakes, but excluding any challenge that required investigation beyond the face of the calculations, *id.* 130a-132a.

Lloyd's tendered Names individualized settlement offers, providing that in exchange for waiving any right to sue Lloyd's or its agents for their misconduct relating to the crisis, the Names would be given credits against their Equitas premium. Pet. App. 19a.

Although many Names accepted the settlement offers, Tropp did not. He continued to believe that he

was not legally responsible for the massive losses incurred in his name during the year after he tendered his resignation, or for any of the environmental syndicates entered into against his express instructions to Lloyd's and his Members' Agent. In addition, Tropp objected that the environmental syndicates were not actually issuing insurance as defined by U.K. law – instead, they were simply passing on known, inevitable losses in violation of the terms of his original contracts with Lloyd's and English insurance law. Complaint ¶¶117-123.

But even setting those objections aside, Tropp had investigated the calculation of his Equitas premium and discovered that Lloyd's had failed to give him credit for the proceeds of the stop-loss insurance he had managed to purchase in 1989 and the profits he had earned on his non-environmental syndicates, both of which his Members' Agent had turned over to Lloyd's at its direction. In addition, Lloyd's failed to account for assets held by his syndicates that should have been credited pro-rata to the Names. Complaint ¶¶126-133.

Lloyd's, however, invoked a bylaw to appoint a "substitute agent" to consent to the R&R Contract on Tropp's behalf. Pet. App. 20a. Although ordinary Members' Agents are subject to the control of their clients, and owed a fiduciary duty to the Names, *id.* 11a, Lloyd's' substitute agent (called "AUA9") operated wholly under Lloyd's control and made no effort to consult with, much less represent the interests of, the Names it was purportedly representing before agreeing to R&R on their behalves en masse, *see id.* 20a; Complaint ¶¶87-88.

E. First Wave Of U.S. Litigation

When the scandal became public, many American Names filed suit against Lloyd's in the United States. The federal courts uniformly dismissed the suits on the basis of the Lloyd's forum selection clause, accepting Lloyd's' representation that the American Names would have a wide range of remedies available to them in the U.K., including causes of action for rescission,[1] negligence,[2] breach of contract,[3] deceit or misrepresentation,[4] breach of fiduciary duty,[5] and restitution.[6]

F. Litigation In The U.K.

Meanwhile, back in England, Lloyd's was aggressively pursuing collection actions against

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[1] *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 161 (7th Cir. 1993); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995); *Allen v. Lloyd's of London*, 94 F.3d 923, 929 (4th Cir. 1996); *Haynsworth v. The Corporation*, 121 F.3d 956, 969 (5th Cir. 1997).

[2] *Shell*, 55 F.3d at 1231; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

[3] *Shell*, 55 F.3d at 1231; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

[4] *Shell*, 55 F.3d at 1231 (accepting representation in affidavit by Lloyd's' Barrister asserting availability of remedies for "misrepresentation (whether innocent, negligent or fraudulent)"); *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

[5] *Shell*, 55 F.3d at 1231; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

[6] *Shell*, 55 F.3d at 1231; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

Names. Within a year of R&R's implementation, the U.K. courts had upheld the lawfulness of the basic scheme, including Lloyd's' right to bind non-consenting Names to the R&R Contract. *See Soc'y of Lloyd's v. Leighs*, [1997] C.L.C. 1398 (C.A.);[7] *see also Soc'y of Lloyd's v. Fraser*, [1998] C.L.C. 1630 (C.A.).[8] Lloyd's then proceeded to convince the U.K. courts that most of the remedies American courts believed were available in England did not apply against Lloyd's.

First, the U.K. courts held that under a provision of the Lloyd's Act of 1982, Lloyd's was immune from all damages claims, absent proof that it had acted in bad faith amounting to fraud. *See, e.g., Price v. Soc'y of Lloyd's*, [2000] Lloyd's Rep. IR 453 (Q.B.)[9] (in light of Lloyd's Act immunity, no tort liability unless the "breach of duty [was] tainted by fraud or in some material respect dishonest. Mere negligence is not enough...."); *Ashmore v. Corp. of Lloyd's*, [1992] 2 Lloyd's Rep. 620 (Q.B.)[10] (Lloyd's immunity applies to contract claims). This precluded Names from asserting claims of negligence, breach of fiduciary duty, and negligent or statutory misrepresentation, all of which Lloyd's told the U.S. courts were available.

Second, although Lloyd's Act immunity barred only damages, non-damages claims against Lloyd's

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[7] *Available at* 1997 WL 1104500.

[8] *Available at* 1998 WL 1034675.

[9] *Available at* 1999 WL 33232626.

[10] *Available at* 1992 WL 895819.

were held precluded on other grounds. For example, even though Lloyd's had told American courts that rescission was an available remedy, it successfully argued the exact opposite to U.K. courts on the ground that rescission would adversely affect the interests of third parties. *See, e.g.*, *Leighs*, [1997] C.L.C. at 1405 (rescission unavailable even if contract was induced by fraud). U.K. courts further held that Lloyd's owed Names no relevant contractual, common law, or statutory duties of due care to comply with the laws governing its operations, to regulate the market, to supervise Lloyd's agents, or even to avoid acting in bad faith. *See Ashmore v. Corp. of Lloyd's*, [1992] 2 Lloyd's Rep. 620 (Q.B.); *Soc'y of Lloyd's v. Clementson*, [1995] C.L.C. 117;[11] *R. v. Lloyd's of London ex parte Briggs*, [1993] 1 Lloyd's Rep. 176.[12]

II. Tropp's Litigation With Lloyd's

A. U.K. Litigation

1. Lloyd's' Suit Against Tropp

In 2002, Lloyd's sued Tropp in England seeking to recover alleged underwriting liabilities and the Equitas Premium. Pet. App. 24a.

Tropp, proceeding pro se, raised two kinds of defenses. First, he argued that he was not legally responsible for many of the losses reinsured through Equitas, including losses from long-tail syndicates and those incurred after he tendered his resignation.

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[11] *Available at* 1994 WL 1062152.

[12] *Available at* 1993 WL 965866.

Second, Tropp challenged the amount of his alleged liability on the ground that it did not account for a number of assets (including his stop-loss insurance proceeds and other syndicate profits) that should have been setoff against his liabilities. Pet. App. 24a-25a.

The U.K. trial court refused to consider either Tropp's "wrongful liability" or his "missing assets" claims, pointing to the "pay now, sue later" and "conclusive evidence" clauses of the R&R Contract. Pet. App. 132a-136a.[13] Any such disputes, the court held, would have to be raised in a separate "counterclaim" lawsuit. *Id.* 134a-135a. An appellate court denied Tropp permission to appeal, agreeing with the trial court that none of Tropp's claims met the "manifest error" exception to the "conclusive evidence" clause and, thus, provided no basis for defense to Lloyd's suit. Pet. App. 103a-106a.

2. Tropp's Suit In Counterclaim

Unlike most American Names who lost collection actions in the U.K., Tropp attempted to exhaust his U.K. remedies, filing a counterclaim that reiterated his wrongful liability and missing assets defenses.

In November 2004, the trial court granted Lloyd's motion to strike the counterclaim for failure to state a claim. Pet. App. 78a-94a.

The court first held that Lloyd's was immune from damages for anything short of fraud. Pet. App.

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[13] The court also noted that prior decisions had upheld Lloyd's' authority to appoint a substitute agent to consent to the R&R Contract on behalf of the Names. Pet. App. 124a.

86a-87a. Moreover, even if Tropp could prove fraud, the court held, he could not be relieved of liability under his syndicates. "Names cannot rescind their underwriting commitments even if they were induced as a result of negligent or fraudulent misrepresentations since to do so would affect third parties." Pet. App. 85a.

These holdings precluded the vast majority of Tropp's arguments, including his claim that Lloyd's wrongly (but not necessarily fraudulently) failed to credit him his "missing assets"; that he could not be held to account for the losses incurred after he resigned; and that he was not liable for the losses of the long-tail syndicates he expressly told Lloyd's he would not consent to join.

That left one remaining claim that arguably sounded in fraud – Tropp's insistence that Lloyd's "brought the losses of the relevant syndicates into the Equitas scheme, knowing that the business was not proper reinsurance to close." Pet. App. 89a. But with respect to this objection, the court held that his claims of conscious avoidance could not constitute an "adequately pleaded case in fraud." *Id.*

An appellate court denied Tropp permission to appeal, rebuffing Tropp's attempts to show that his claims fell outside the scope of the Lloyd's immunity. Pet. App. 69a-71a. Moreover, although Lloyd's' claim against Tropp was for breach of contract, the court held that Tropp could not raise contract claims against Lloyd's. "There is," the court explained, "no claim in contract against the Society, there can only be a claim in fraud based upon dishonesty." *Id.* at 70a.

Finally, although the court in Lloyd's' collection suit had told Tropp to raise his "missing assets" set-off claim in counterclaim, the court in his counterclaim appeal held that "[t]here are, in fact, no causes of action arising from the law of set off." Pet. App. 71a. And because Tropp could not assert the basis of his set-off claims – *e.g.*, breach of contract or other common law or statutory duty to credit his missing assets – absent a showing of fraud, he had no basis for challenging Lloyd's calculation of his alleged debt. *Id.*

B. U.S. Litigation

Tropp now faced a judgment for nearly $900,000 and the prospect that over the next eighty years he could be called upon to pay even more if Equitas' funding proved inadequate to pay the reinsured liabilities.[14] Having tried to obtain a hearing on his claims and defenses in the U.K. courts, but been rebuffed at every turn, he turned to the courts of this country.

1. District Court

Tropp filed a putative class action in the Southern District of New York, seeking: (1) declaratory and injunctive relief precluding recognition of the U.K. judgment in New York; and (2) "an accounting of all transactions between himself and Lloyd's." Pet. App. 6a.

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[14] *See* Complaint ¶86 (explaining "Lloyd's reserved the right to collect from its Members who settled and paid their Equitas Premium any shortfall if the Equitas reserves were insufficient").

Lloyd's moved to dismiss, relying on its forum selection clause and arguing that the U.K. judgment met the requirements for recognition in New York.

Forum Selection Clause. The district court held that foreign forum selection clauses are unenforceable in federal court:

> (1) if their incorporation into the agreement was the result of fraud or overreaching; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state.

Pet. App. 33a (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15, 18 (1972); *Roby v. Society of Lloyd's*, 996 F.2d 1353,1363 (2d Cir. 1993)).

The court rejected Tropp's reliance on the third "unavailable remedies" factor because, it held, a forum selection clause must be enforced unless the designated forum "denies all remedies whatsoever." Pet. App. 35a. In this case, the court held, Tropp was not denied all relief because U.K. law permits suits against Lloyd's for fraud. Pet. App. 38a-39a.[15] The court did not dispute, however, that as a practical

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[15] Although Lloyd's had argued that Tropp also had remedies available against his agents, *but see infra*, at 38-39, the district court did not base its decision on that disputed assertion. Pet. App. 39a-40a.

matter, this was no remedy at all for plaintiffs whose injuries were the result of unlawful conduct having nothing to do with fraud (*e.g.*, Lloyd's failure to credit Names for stop-loss insurance proceeds).

Recognition of U.K. Judgment. The court also dismissed Tropp's challenge to the enforceability of the U.K. judgment. Pet. App. 41a-52a.

"The question of whether a foreign judgment is enforceable," the court held, "is a matter of state law," Pet. App. 41a, governed by New York's enactment of the Uniform Foreign Money-Judgments Recognition Act (Recognition Act), N.Y. C.P.L.R. §§ 5301 *et seq.* That statute provides that foreign judgments are ordinarily enforceable in the state, unless one of several exceptions is met. Among other things, a judgment is not enforceable if "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." *Id.* § 5304(a)(1). In addition, a court may deny enforcement if "the cause of action on which the judgment is based is repugnant to the public policy" of New York. *Id.* § 5304(b)(4).

The district court concluded that Tropp could make neither showing. First, the court held that "the proper inquiry under the Recognition Act is whether the judgment in question was obtained from a *system* that affords due process of law," Pet. App. 44a (emphasis in original), precluding any challenge based on the unfairness of the procedures applied to a class of cases (*e.g.*, suits regarding the Lloyd's R&R) or any particular case (*e.g.*, Tropp's). And there was no question that England's legal system was fair. *Id.* The court also opined that in any event, Tropp received due process because he was afforded an

opportunity to be heard and received decisions on his claims (albeit decisions concluding that his claims could not be considered). While the substance of English law may have made those legal proceedings pointless, "due process under the Recognition Act is concerned only with *procedural* due process, not *substantive* due process." Pet. App. 48a (emphasis in original).

Likewise, the court held that the test for repugnancy to public policy must be conducted at such a high level of generality that Tropp could not possibly meet it: "the cause of action underlying Lloyd's judgments against the Names is simple breach of contract, and causes of action for breach of contract do not violate the public policy of New York." Pet. App. 51a (citing *Soc'y of Lloyd's v. Grace*, 718 N.Y.S.2d 327, 328 (App. Div. 2000)).

Due Process Challenge. Finally, the court rejected Tropp's assertion that "if the Recognition Act does not bar enforcement of the English judgment, then the Recognition Act as applied to his case is unconstitutional under the Due Process Clause." Pet. App. 53a.

2. Court of Appeals

The Second Circuit affirmed. It first upheld the district court's forum selection clause holding, relying on *Roby v. Soc'y of Lloyd's*, 992 F.2d 1353 (2d Cir. 1993), which had previously concluded that U.K. law provided Names adequate securities fraud remedies to justify enforcement of the Lloyd's forum selection clause. Pet. App. 2a-3a. The court acknowledged that since *Roby* was decided in 1993, "some of the claims against Lloyd's" that it had believed were

available, "are now precluded" by subsequent U.K. decisions. *Id.* 3a. But the court nonetheless held to its view that "Lloyd's forum selection clauses (of which this is one) are valid because U.K. remedies are available." *Id.*

With respect to recognition of the U.K. judgment, the Second Circuit agreed with the district court that under New York law, the only "relevant inquiry" is the "overall fairness of England's legal 'system,' which is beyond dispute." Pet. App. 4a (quoting *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 160 (N.Y. 2003)). It likewise rejected any claim that recognition would violate the public policy of New York, relying on a prior decision from an intermediate New York appellate court. Pet. App. 4a-5a (citing *Grace*, 718 N.Y.S.2d at 328).

Finally, the court addressed one aspect of Tropp's federal due process challenge (rejecting the rest without discussion). The court acknowledged Tropp's argument that by enforcing the "pay now, sue later" and "conclusive evidence" clauses to which Tropp had never consented, the U.K. courts had effectively allowed Lloyd's to be the sole judge of the existence and extent of the liability owed to itself. Pet. App. 5a. Such a system, Tropp argued, was akin to the one declared unconstitutional in *Tumey v. Ohio*, 273 U.S. 510 (1927), in which a mayor adjudicated misdemeanor charges while receiving a portion of the resulting fines to supplement his salary. The Second Circuit found the analogy unconvincing because "the U.K. courts themselves had no financial interest in the outcome of Tropp's cases." Pet. App. 5a.

REASONS FOR GRANTING THE WRIT

Increasingly, American citizens and businesses are subject to suit in foreign courts under laws and procedures that may be fundamentally incompatible with our basic notions of due process or other constitutional values. In this case, for example, Tropp was subject to a system under which he was effectively precluded from challenging Lloyd's' assertion of financially ruinous liability, a system that would be held unconstitutional if implemented in the United States under this Court's decisions in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), and *Tumey v. State of Ohio*, 273 U.S. 510 (1927).

This case presents the Court an opportunity to provide much needed guidance on the constraints the Due Process Clause imposes on states' authority to enforce an otherwise unconstitutional judgment simply because it was obtained abroad. The case also presents the related question of when federal courts may provide a backup forum for the resolution of international disputes, despite a forum selection clause, when there are severe limitations on the claimant's right to present the legal and factual basis for his claims in the foreign forum.

I. Certiorari Is Warranted To Decide What Limitations The Due Process Clause Imposes On The Recognition Of Foreign Judgments.

By themselves, foreign judgments have no effect in the United States; the defendant's property is extracted only by virtue of the judgment's recognition

and enforcement by our courts. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). The resulting deprivation of property by the state is subject to the restrictions of the Due Process Clauses of the Fifth and Fourteenth Amendments. This case demonstrates the need for effective implementation of those constitutional protections in a world of increasingly international litigation.

A. As Commonly Applied, State Recognition Acts, Including New York's, Are Inadequate To Protect The Due Process Rights Of Americans Sued In Foreign Jurisdictions.

The Second Circuit, like most courts, treats the recognition of foreign judgments as a question of state law. Pet. App. 3a. New York and most other states have adopted the Uniform Foreign Money-Judgments Recognition Act. *See* N.Y. C.P.L.R. §§ 5301 *et seq.*; National Conference of Commissioners on Uniform State Laws, *Foreign-Country Money Judgments Recognition Act Summary*[16] (1962 version of Act adopted in thirty-two states).[17] These statutes generally prohibit enforcement of judgments from jurisdictions that fail

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[16] *Available at* http://www.nccusl.org/ActSummary.aspx?title=Foreign-Country Money Judgments Recognition Act.

[17] A 2005 revision has been adopted in fifteen states. National Conference of Commissioners on Uniform State Laws, *Legislative Fact Sheet – Foreign-Country Money Judgments Recognition Act*, *available at* http://www.nccusl.org/LegislativeFactSheet.aspx?title=Foreign-Country Money Judgments Recognition Act.

to provide due process, and do not require recognition of judgments founded on causes of action repugnant to state policy. Pet. App. 4a. But over time, those limitations have been construed so permissively that it is now clear they are inadequate to protect the due process rights of Americans sued abroad. Two deficiencies are starkly illustrated on the facts of this case and the hundreds of cases like it arising from the Lloyd's scandal.

First, while the Uniform Recognition Act requires courts to examine the procedural fairness of the foreign forum, courts have limited the inquiry to "whether the judgment in question was obtained from a *system* that affords due process of law," Pet. App. 44a (emphasis in original), rather than examining whether the system fairly adjudicates the class of claims of which the defendant's is a part, or the defendant's particular case, *id.*; *see also*, *e.g.*, *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 160 (N.Y. 2003); Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1188 n.191 (2007) (collecting cases).

That protection is wholly inadequate. Due process is an individual right to actually receive basic procedural protections, not simply the right to a system that *usually* affords the basic requirements of procedural fairness. *Cf. Hilton v. Guyot*, 159 U.S. 113, 205 (1895) (explaining that it must "always be kept in mind that it is the paramount duty of the [U.S.] court . . . to see to it that the *parties have had* a fair and impartial trial" abroad) (emphasis added). Even when enforcing judgments of other states – which, unlike foreign judgments, are issued through

trials directly subject to the Due Process Clause and are constitutionally entitled to recognition under the Full Faith and Credit Clause – U.S. courts may not simply assume that generally fair systems always result in judgments entitled to recognition. *See, e.g.*, *Griffin v. Griffin*, 327 U.S. 220, 229 (1946) (holding that "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process" and scrutinizing whether prior court had violated due process in exercising personal jurisdiction over particular defendant); *Bird v. Glacier Electric Coop., Inc.*, 255 F.3d 1136, 1144 (9th Cir. 2001) (recognition of tribal judgment denied because the plaintiff's "closing argument violated due process").

Second, state recognition statutes have been interpreted to examine the *substantive* compatibility of a foreign judgment with U.S. law at such a high level of generality as to afford essentially no protection at all in a great many cases, including this one. Here, under New York precedent, it was sufficient that Lloyd's suit was based on "breach of contract" because "causes of action for breach of contract do not violate the public policy of New York." Pet. App. 51a; *see also, e.g.*, *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 333 (5th Cir. 2002) (same under Texas law); *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 995 (10th Cir. 2005) (same in New Mexico); *Soc'y of Lloyd's v. Mullin*, 96 Fed. Appx. 100, 103 (3d Cir. 2004) (unpublished) (same in Pennsylvania).

Of course, all manner of contract claims are deeply offensive to federal policy and constitutional values – *e.g.*, contracts regarding the sale of illegal drugs and prostitution, or involving child labor or

racial discrimination, etc. It cannot reasonably be contended that the Constitution would permit a state to enforce such a judgment, whether rendered in the United States or abroad, simply because it could be described as sounding in contract. *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953) (judicial award of damages for breach of racially restrictive covenant violates the Equal Protection Clause).

B. Whether State Recognition Statutes, As Construed, Are Adequate To Fulfill States' Obligations Under The Due Process Clause Is A Question Of Growing Importance.

The questions presented by this petition are of pressing importance, not simply for the hundreds of American Names subject to Lloyd's U.K. judgments, but also for the great numbers of American businesses, investors, and individuals who are increasingly exposed to suit in foreign jurisdictions. *See, e.g., Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (addressing French judgment against American internet service provider for allowing online access to Nazi materials); *Dow Jones & Co., Inc. v. Gutnick*, (2002) C.L.R. 575 (Austl.) (High Court of Australia holds publisher of *Wall Street Journal* subject to Australian suit for libel based on an article published on the paper's web site, accessible in Australia); *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997) (denying recognition to U.K. libel judgment that would violate First Amendment); *see also* INVESTMENT COMPANY INSTITUTE, INVESTMENT COMPANY FACT BOOK Table 23 (50th ed. 2010)

(documenting dramatic increase in global investments by American mutual funds).[18]

The fundamental fairness of foreign law and foreign courts varies enormously around the globe, and from case to case. *See, e.g.*, Virginia A. Fitt, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 VA. J. INT'L L. 1021, 1033-38 (2010). The risks to Americans are heightened by an emerging practice among some plaintiffs to seek out favorably disposed foreign forums in which to litigate their claims against Americans, with the expectation that the resulting judgment will be recognized and enforced in the United States. *See, e.g.*, JONATHAN DRIMMER, THINK GLOBALLY, SUE LOCALLY: OUT-OF-COURT TACTICS EMPLOYED BY PLAINTIFFS, THEIR LAWYERS, AND THEIR ADVOCATES IN TRANSNATIONAL TORT CASES 4 (2010);[19] AVI BELL, LIBEL TOURISM: INTERNATIONAL FORUM SHOPPING FOR DEFAMATION CLAIMS (2008);[20] Lucien J. Dhooge, Aguinda v. Chevrontexaco: *Discretionary Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENVTL. L.J. 241 (2010) (describing suit for $27.3 billion filed by American lawyers against Chevron in Ecuadorian courts, with expected enforcement in the U.S.); *Osorio v. Dole*

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[18] *Available at* http://www.icifactbook.org/pdf/2010_factbook.pdf

[19] *Available at* www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf.

[20] *Available at* www.globallawforum.org/UserFiles/puzzle22New(1).pdf.

Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (suit seeking enforcement of $97 million Nicaraguan judgment against American company).

In recent years, this Court has developed a body of constitutional principles to help prevent similar forum shopping within the United States and to prevent American courts from giving effect to arbitrary judgments rendered by juries, often against foreign companies doing business in the United States. *See, e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (elaborating Due Process restrictions on punitive damages awards). It is no less imperative that this Court make meaningful the constitutional limitations on the power of those same courts to give effect to oppressive judgments of foreign courts against Americans doing business overseas.

C. The Due Process Clause Forbids Enforcement Of Lloyd's' U.K. Judgment In The United States.

New York's recognition of the U.K. judgment in this case cannot be reconciled with the Due Process Clause or this Court's decisions.

Tropp does not argue that a judgment is unenforceable in the United States unless obtained through procedures, or under substantive law, identical to our own. But the Due Process Clause does not permit enforcement of a judgment obtained without adherence to the fundamental precepts of due process, including the right to a genuine opportunity to contest the existence and extent of alleged liability. *Cf. Hilton*, 159 U.S. at 202-03; *Windsor v. McVeigh*, 93 U.S. 274, 280 (1876)

(embracing assertion that a foreign judgment issued with "no opportunity of . . . making a defence . . . . deserves not the respect of any foreign nation" because it violates "the eternal principles of justice") (citation omitted). That opportunity was not afforded in this case.

1. Tropp Was Denied A Reasonable Opportunity To Contest Lloyd's' Claims.

The U.K. courts were bound to enter judgment in Lloyd's' favor for the amount of the debt Lloyd's alleged, except in the most extraordinary circumstances. Although the alleged basis of the lawsuit was contractual, Tropp was prevented from showing that under the terms of his original contract with Lloyd's, he did not actually owe the debt that Lloyd's was forcing him to reinsure, unless he could show that this breach of contract amounted to fraud. Nor was he permitted to show that even accepting Lloyd's assertion that he was legally responsible for his syndicate losses, the amount of his alleged debt was wrong because it failed to credit him for his stop-loss insurance, other syndicate profits, and his share of syndicate assets.

Such a system runs afoul of two lines of this Court's Due Process cases.

First, the Court has been clear that although states may sometimes enact the equivalent of a "pay now, sue later" requirement, its constitutionality is dependent on the availability of a "clear and certain" post-deprivation remedy. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990). Thus, while a state can require taxpayers to pay disputed taxes under protest, the Due Process

Clause requires "a fair opportunity to challenge the accuracy and legal validity of their tax obligation" through a refund action. *Id.* In light of that obligation, a state obviously could not require immediate payment of taxes and "then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich v. Collins*, 513 U.S. 106, 108 (1994). Yet the U.K. courts permitted Lloyd's to do exactly that – demand immediate payment of the Equitas Premium without any ability to raise numerous defenses to liability, on the promise of the right to air those defenses in a subsequent suit, only then to turn around and insist that the defenses were barred by Lloyd's' immunity.

The district court noted that immunity defenses are common in the law. But Tropp's objection is not simply to the existence of Lloyd's' immunity, but rather to how it was *used* as a sword rather than a shield – *i.e.*, to prevent any defense to its claim of liability. A state could not, for example, demand immediate payment of contested taxes and then assert sovereign immunity to bar any refund claim.

Second, by precluding any effective challenge to Lloyd's' assertion of liability, the U.K. litigation deprived Tropp of his basic due process right to have his liability determined by a fair and impartial adjudicator. *See, e.g., Tumey*, 273 U.S. at 523.

This Court examined a similar scheme in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). There, the Court considered a provision of the Multiemployer Pension Plan Act Amendments (MPPAA). The Act authorized the trustee of a multiemployer pension plan to

calculate a withdrawing employer's vested liabilities and require immediate payment of that assessment, subject to a later challenge in arbitration. This Court held that, in light of the trustee's interest in securing adequate funding for the plan, the constitutionality of the regime depended on the adequacy of the employer's ability to challenge the trustee's assessment in the later arbitration. The Court explained that "if the employer were required to show the trustees' findings to be either 'unreasonable or clearly erroneous,' there would be a substantial question of procedural fairness under the Due Process Clause." *Id.* at 626.

> In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor's findings, even if they were probably incorrect, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made. In light of our assumption of possible [trustee] bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause.

Id. (citations omitted). The Court therefore declined to read the statute to require employers to disprove the claimed liability by clear and convincing evidence. *Id.* at 629.

The system applied by the U.K. courts in this case is far more offensive to due process than even the reading of the MPPAA this Court avoided in *Concrete Pipe*. Under U.K. precedent, Tropp was not simply required to show that Lloyd's claim of liability

was clearly erroneous; he had to show that it was grounded in fraud.

Finally, some courts have suggested that Names' objections to the U.K. system are not procedural – after all, they obtained a hearing; they were simply deprived of any defense as a matter of substantive law, as if England had passed a statute providing that "Names shall pay Lloyd's whatever it demands." *See Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 480 (7th Cir. 2000); Pet. App. 48a. But the same could have been said of the MPPAA, which could be characterized as providing that "employers shall pay whatever liability the plan trustee determines." In any event, both procedural and substantive arbitrariness violate the Due Process Clause. *See, e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537-38 (1998). And that substantive arbitrariness cannot evade constitutional scrutiny by cloaking itself in an innocuous "breach of contract" label. *Cf.* Pet. App. 51a.

2. Tropp Did Not Waive His Rights To Due Process By Agreeing To Abide By Lloyd's Bylaws.

The only basis Lloyd's has for arguing that the R&R litigation is even remotely consistent with basic notions of due process is its assertion that Tropp agreed to it. But, of course, he did not. Lloyd's agreed to the R&R terms on Tropp's behalf through the substitute "agent" that was Tropp's agent in name only, reporting instead to Lloyd's and acting in the interest of its creator and not its alleged principal.

But, Lloyd's argues, Tropp consented to have Lloyd's appoint a substitute agent to make decisions for him (even, apparently, to the appointment of an agent controlled by Lloyd's and appointed for the sole purpose of agreeing to waive due process rights that Tropp himself had pointedly refused to waive on his own). But Lloyd's' only evidence of such an agreement is a boilerplate provision in Tropp's General Undertaking that required compliance with existing and future Lloyd's bylaws. Pet. App. 13a, 20a. That cannot suffice. Although parties may agree in advance to waive some procedural due process rights, *see, e.g., D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185 (1972), the necessary precondition for the waiver of any constitutional right is actual knowing and voluntary consent, *see id.* at 186 (waiver sustained where party directly agreed to forego court proceedings and did "not contend . . . that it or its counsel was not aware of the significance" of the waiver). Tropp's agreement to abide by Lloyd's bylaw cannot be construed as a knowing waiver of a right to defend himself against any future assertion of debt by Lloyd's. *Compare Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972).

D. This Case Presents An Ideal Opportunity To Resolve This Important Question.

1. Since Tropp was the first Name to completely exhaust his U.K. remedies, his case presents an ideal vehicle with a well-developed record for considering the constitutional limitations on the recognition of foreign judgments.

The facts of this case present the constitutional questions in stark relief. The court of appeals summarily concluded that the U.K. judgment in this case satisfied New York's due process test because the only "relevant inquiry under [state law] is the overall fairness of England's legal 'system,' which is beyond dispute." Pet. App. 4a (citation omitted). Had the Second Circuit asked, instead, whether the U.K. system provided fundamentally fair proceedings for adjudicating Names' alleged liability, or Tropp's in particular, it could not have been so cavalier. *See supra*, at 28-33.

Likewise, the differences in the standard for substantive review of the U.K. law upon which the judgment is based could hardly be more important in this case. To ask only whether "breach of contract" claims are consistent with U.S. policy and constitutional values is to provide effectively no review at all. Stripped of its innocuous label, the law applied by the U.K. courts becomes impossible to defend.

2. Lloyd's argued below that Tropp's declaratory judgment action was independently barred by the forum selection clause. But that claim is no barrier to this Court's resolution of the first question presented by this petition, as the forum selection ruling is equally erroneous and deserving review. *See infra*, at 35-39.

But even if this Court were to deny certiorari on the forum selection question, the recognition ruling would still be properly presented. Neither the district court nor the court of appeals addressed Lloyd's' odd assertion that the forum selection clause applied to require the parties to litigate in England

whether the U.K. judgment should be recognized in New York. *But see, e.g., Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 632 (9th Cir. 1982) (forum selection clause does not bar ancillary proceeding in the United States regarding foreign judgment). Accordingly, the Second Circuit's decision is best read as relying on the forum selection clause only to dispose of Tropp's request for an accounting.[21]

II. The Court Should Also Grant Certiorari To Decide When Limitations On Available Remedies Preclude Enforcement Of An International Forum Selection Clause.

Unable to obtain a fair hearing on his defenses in the U.K., Tropp filed suit for an accounting here to determine the true scope of any liability he may or may not have to Lloyd's. The lower courts dismissed that claim on the basis of Lloyd's' forum selection clause. Pet. App. 2a-3a, 32a-41a. That decision was wrong as well and independently warrants this Court's review.

A. The Lower Courts Are Divided Over The Proper Application Of This Court's "Available Remedies" Cases.

In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court held that a forum selection clause is enforceable in federal court unless shown to

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[21] To the extent there is language in the district court's opinion suggesting that its forum selection clause holding applied to both Tropp's claim for an accounting and his declaratory judgment request, the Second Circuit said nothing to indicate that it accepted Lloyd's' indefensible argument.

be "unreasonable under the circumstances." *Id.* at 10 (citation omitted).

Applying that standard, the courts of appeals generally recognize that a forum selection clause may not be enforced to deprive an individual of a federal forum when the "fundamental unfairness of the chosen law may deprive the plaintiff of a remedy." Pet. App. 3a (quoting *Roby v. Soc'y of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993)); *see also, e.g.*, *Albemarle Corp. v. AstraZeneca U.K. Ltd.*, 628 F.3d 643, 651 (4th Cir. 2010); *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009). However, the lower courts have divided over the proper implementation of that standard, both in the context of enforcement of foreign forum selection clauses and in the closely related context of *forum non conveniens*.

Relying on this Court's *forum non conveniens* decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Second Circuit has held that a forum selection clause is enforceable unless its enforcement will deprive the opposing party of "*any* remedy." *Roby*, 996 F.2d at 1363 (quoting *Piper*, 454 U.S. at 254-55) (emphasis added by Second Circuit). It was thus enough in this case that Tropp could bring a claim of fraud against Lloyd's, even if his most significant objections did not sound in fraud. *See* Pet. App. 3a, 38a-39a.

The Seventh Circuit has taken an even more limited view, holding that the availability of remedies under the law of the forum jurisdiction is entirely irrelevant when the forum selection clause is coupled with a choice of law provision designating the foreign

forum's law as governing any dispute. *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 210-11 (7th Cir. 1993).

On the other hand, in a case similar in important respects to this one, the D.C. Circuit applied the same *Piper* standard but concluded that a defendant's immunity under foreign law made a remedy against the defendant in that jurisdiction unavailable and the case maintainable in U.S. courts. *See El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677-78 (D.C. Cir. 1996). The Fifth Circuit likewise held in *Calix-Chacon v. Global Int'l Marine, Inc.*, 493 F.3d 507 (5th Cir. 2007), that a remedy was not available within the meaning of *Bremen* if it was ineffective as a practical matter to the particular plaintiff because of limitations in the foreign forum on the amount of damages. *Id.* at 514-15.

B. The Second Circuit's Decision Contravenes This Court's International Forum Selection Decisions.

The scant scrutiny afforded international forum selection clauses by the Second Circuit and other courts is incompatible with this Court's precedents.

As this case illustrates, enforcement of a forum selection clause can be unreasonable even if the party challenging the clause could bring *some* kind of claim against *some* defendant in the foreign jurisdiction. In *Piper* itself, this Court explained that "where the remedy offered by the other form is clearly unsatisfactory, the other forum may not be an adequate alternative," thereby justifying denial of a request to remove the case from federal court. 454 U.S. at 254 n.22. As shown above, U.K. law pervasively precluded Tropp from obtaining any

remedy on his non-fraud claims against Lloyd's, either in defense against Lloyd's assertion of liability or in counterclaim.

Lloyd's also argued that Tropp had alternative remedies against his agents, and the district court expressed some sympathy for that claim without directly accepting its premise. *See* Pet. App. 39a-40a. But many of Tropp's claims had nothing to do with his agents – for example, his claim that Lloyd's itself had failed to credit him the proceeds of his stop-loss insurance and other syndicate profits after his agents turned those funds over to Lloyd's at its direction. *See* Complaint ¶¶129-130. In addition, any claim against his agents would have no practical value because Lloyd's would be entitled to impound the proceeds of any such suit and hold them for the eighty-year life of the Equitas trust. *See* Pet. App. 38a, 39a; Tropp Reply Declaration ¶60.[22]

Finally, even if an agent remedy were theoretically available, it would make no legal difference. Tropp's claim was that he did not owe Lloyd's the money it claimed. It is unreasonable to require him to pay Lloyd's money he did not owe, without any real chance to contest his liability, simply on the ground that he might be able to mitigate his losses by suing someone else in a separate (and, no doubt, costly) lawsuit. *Cf. Logan v.*

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[22] The district court acknowledged that Lloyd's would impound any proceeds and hold them as security. Pet. App. 40a. It appears to have missed, or erroneously ignored, however, that Lloyd's could hold the security for the eighty-year life of the Equitas Trust.

Zimmerman Brush Co., 455 U.S. 422, 436-37 (1982) (right to bring a separate post-deprivation suit to challenge denial of right to original hearing inadequate under Due Process Clause).

Accordingly, the Second Circuit's decision is incompatible with *Bremen* and warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 11, 2011

APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

RICHARD A. TROPP, individually, and on behalf of all others similarly situated, Plaintiff-Appellant,

v.

CORPORATION OF LLOYD'S, also known as The Society of Lloyd's, Defendant-Appellee.

No. 08-2332-cv.
July 19, 2010.

Appeal from a judgment of the United States District Court for the Southern District of New York (Buchwald, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Richard A. Tropp, pro se, New York, NY, for Appellant.

John W. Brewer, Fried, Frank, Harris, Shriver & Jacobson LLP, New York, NY, for Appellee.

PRESENT: DENNIS JACOBS, Chief Judge, RICHARD C. WESLEY, DENNY CHIN, Circuit Judges.

SUMMARY ORDER

Plaintiff, Richard Tropp, *pro se*, appeals from an order of the United States District Court for the Southern District of New York (Buchwald, J.) dismissing his action against defendant, the Corporation of Lloyd's ("Lloyd's"), on the grounds of

improper venue and failure to state a claim. We assume the parties' familiarity with the underlying facts, the case's procedural history, and the issues presented for review.

"Where the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause, our review is de novo." *Altvater Gessler-J.A. Baczewski Int'l (USA) Inc. v. Sobieski Destylarnia S.A.*, 572 F.3d 86, 89 (2d Cir.2009) (internal quotation marks omitted). The party seeking enforcement of a forum selection clause must demonstrate that: "(1) the clause was reasonably communicated to the party resisting enforcement; (2) the clause was mandatory and not merely permissive; and (3) the claims and parties involved in the suit are subject to the forum selection clause." *Id.*

Once the party seeking enforcement has established these conditions, the burden shifts to the party resisting enforcement to rebut the presumption of enforceability by "making a sufficiently strong showing that 'enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" *Phillips v. Audio Active, Ltd.*, 494 F.3d 378, 383-84 (2d Cir.2007) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). "The Supreme Court has construed this exception narrowly." *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir.1993).

Tropp's primary challenge to the district court's Rule 12(b)(3) holding is that the forum selection clause is unenforceable because United Kingdom law

deprived him of any remedy, *See, e.g., Roby v. Soc'y of Lloyd's*, 996 F.2d 1353 (2d Cir.1993) (A forum selection clause is unreasonable "if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy."), and that his experiences in UK courts provide a record of this deprivation that was unavailable to the courts that have previously upheld the forum selection clause contained in Lloyd's General Undertaking agreement.

True, at least some claims against Lloyd's are now precluded by conclusions reached in unrelated UK litigation. *See Laws v. Soc'y of Lloyds*, [2003] EWCA (Civ) 1887, [65]. However, the UK courts did not dismiss Tropp's counterclaims on that basis. Moreover, although Tropp was unsuccessful in his attempts to assert defenses and counterclaims against Lloyd's in the UK courts, his experiences do not cause us to revisit our holding that the Lloyd's forum selection clauses (of which this is one) are valid because UK remedies are available. *See, e.g., Roby*, 996 F.2d at 1365-66.

We review *de novo* the district court's dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *See, e.g., Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir.2009). We "assume all 'well-pleaded factual allegations' to be true, and 'determine whether they plausibly give rise to an entitlement to relief.'" *Id.* (quoting *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009)).

Whether a foreign judgment is domestically enforceable is a matter of state law. Fed.R.Civ.P. 69(a)(1). New York's Recognition Act applies to "any

foreign country judgment which is final, conclusive and enforceable where rendered." N.Y. C.P.L.R. 5302. A judgment that satisfies 5302 "is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense." N.Y. C.P.L.R. 5303. "A foreign country judgment is not conclusive if," *inter alia*, "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." N.Y. C.P.L.R. 5304(a). "A foreign country judgment need not be recognized if," *inter alia*, "the cause of action on which the judgment is based is repugnant to the public policy of this state." N.Y. C.P.L.R. 5304(b).

Tropp argues that Lloyd's UK judgment is unenforceable because UK law employs a "sub-system" for claims like his, that denies due process to aggrieved Names. The New York Court of Appeals however, upholding the recognition of a default English judgment, held that the "relevant inquiry under C.P.L.R. 5304(a)(1) is the overall fairness of England's legal 'system,' which is beyond dispute." *See CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 762 N.Y.S.2d 5, 792 N.E.2d 155, 160 (2003).

Tropp contends that recognition of the UK judgment would be repugnant to various elements of New York's public policy. But *Society of Lloyd's v. Grace*, 278 A.D.2d 169, 718 N.Y.S.2d 327 (2000) involved a litigant in Tropp's circumstances-in particular, the UK court "entered summary judgment without allowing defendants to present

their fraud claim or challenge the amount sought by Lloyd's"-and the First Department concluded that "since the underlying English judgments are procedurally sound and do not violate any public policy of New York or the United States, they are entitled to comity." *Id.* at 328.

Finally, Tropp argues that, if the UK judgment does not violate the Recognition Act, then the Recognition Act itself violates his federal constitutional due process rights. He contends, as does the brief amicus curiae, that the case is controlled by *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), which holds that it "certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523, 47 S.Ct. 437. In this case however, Tropp is not facing criminal charges, but rather a civil judgment for breach of contract relating to his voluntary relationship with Lloyd's. More importantly, although the UK courts gave conclusive effect to Lloyd's calculation of Tropp's liability, the UK courts themselves had no financial interest in the outcome of Tropp's case.

Finding no merit in Tropp's remaining arguments, we hereby **AFFIRM** the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

Richard A. TROPP, individually, and on behalf of all others similarly situated, Plaintiff,

v.

The CORPORATION OF LLOYD'S, also known as The Society of Lloyd's, Defendant.

No. 07 Civ. 414(NRB).
March 26, 2008.

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, District Judge.

Plaintiff Richard Tropp brings this suit seeking (1) a declaratory judgment that a judgment obtained against him in England ("English judgment") by the Corporation of Lloyd's (also known as the Society of Lloyd's, hereinafter "Lloyd's") is unenforceable here under New York statutory law or the Due Process Clause of the Fifth Amendment; (2) an accounting of all transactions between himself and Lloyd's; (3) an injunction restraining Lloyd's from enforcing the English judgment in New York; and (4) class certification of all similarly situated plaintiffs.

Defendant Lloyd's moves to dismiss all claims pursuant to Fed.R.Civ.P. 12(b)(3) for improper venue, since Tropp agreed in the "Choice Clause" of his contract with Lloyd's to litigate all disputes with Lloyd's in England, or in the alternative pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim.

Tropp is an individual underwriter, or "Name," in the English insurance market that is regulated by Lloyd's. Whereas Tropp initially invested $160,000 (the bulk of his retirement savings) in that market, due to its collapse, unlimited personal liability, and, according to Tropp, mismanagement and fraud on the part of Lloyd's, Tropp now stands personally liable on a judgment entered by an English court for upwards of $900,000.[1] As discussed extensively below, the judgment represents both Tropp's purported individual underwriting losses as well as his share of a mandatory reinsurance premium imposed on all Names by Lloyd's.

This case presents the latest episode in an epic saga between Names such as Tropp and Lloyd's. The story-Dickensian in length and complexity-has been retold countless times by American courts. *See, e.g., Soc'y of Lloyd's v. Siemon-Netto,* 457 F.3d 94, 96 (D.C.Cir.2006) ("Eight circuit courts have set forth the background information that is relevant to this appeal ... [there is] no need to reinvent the wheel.")[2]

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[1] A judgment against Tropp for £463,881.28 (including interest and costs) was entered by the High Court of Justice. Queen's Bench Division on May 24, 2004. *See* Declaration of Richard A. Tropp Ex. AE [*Soc'y of Lloyd's v. Tropp* [2004] EWHC 1397 (Comm.) (Gross, J.)]. Tropp subsequently was denied permission to appeal. Tropp Decl, Ex.i AF, [*Tropp v. Soc'y of Lloyd's* [2004] EWCA Civ. 1544 (Waller, J.)]. The judgment is final. Under exchange rates as of March 24, 2008 (1.9B dollars to the pound) the judgment equates to approximately $918,484.93.

[2] *See also Soc'y of Lloyd's v. Reinhart,* 402 F.3d 982, 988 (10th Cir.2005) ("[N]umerous courts have summarized the basic facts applicable to the underlying litigation, and these facts are not in dispute").

Not only are the basic facts well-known, but the results are as well. Since the year 2000, by this Court's tally, Names have lost at least 25 separate challenges in American courts (including appeals in eight federal circuit courts) to various aspects of the enforceability of English judgments obtained by Lloyd's.[3] Not a single Name has yet prevailed.

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[3] Names have generally lost challenges on one of two grounds. First, those Names that have sued Lloyd's here have lost on the basis of the "Choice Clause," which requires Names to litigate against Lloyd's in England under English Law. Second. Names against whom Lloyd's has sought to enforce judgments here have lost under the various states' enactments of the Uniform Foreign Country Money-Judgments Recognition Act, or under general common law principles of comity.

Cases that have enforced the Choice Clause include: *Lipcon v. Underwriters at Lloyd's,* 148 F.3d 1285 (11th Cir.1998); *Richards v. Lloyd's of London,* 135 F.3d 1289 (9th Cir.1998) (en banc); *Haynsworth v. Corp. of Lloyd's,* 121 F.3d 956 (5th Cir., 1997); *Allen v. Lloyd's of London,* 94 F.3d 923 (4th Cir.1996); *Shell v. R.W. Strurge, Ltd.,* 55 F.3d 1227 (6th Cir.1935); *Bonny v. Soc'y of Lloyd's,* 3 F.3d 156 (7th Cir.1993); *Riley v. Kingsley Underwriting Agencies Ltd.,* 969 F.2d 953 (10th Cir.1992).

Cases that have enforced Lloyd's judgments against Names include: *Soc'y of Lloyd's v. Siemon-Netto,* 457 F.3d 94 (D.C.Cir.2005); *Lloyd's v. Reinhart,* 402 F.3d 982 (10th Cir.2005), *cert. denied* 546 U.S. 826, 126 S.Ct. 366, 163 L.Ed.2d 73 (2005); *Soc'y of Lloyd's v. Blackwell,* 127 Fed.Appx. 961 (9th Cir.2005); *Soc'y of Lloyd's v. Borgers,* 127 Fed. Appx. 959 (9th Cir.2005); *Soc'y of Lloyd's v. Fuerst,* 138 Fed.Appx. 873 (8th Cir.2005); *Soc'y of Lloyd's v. Cohen,* 108 Fed.Appx 126 (5th Cir.2004); *Soc'y of Lloyd's v. Mullin,* 96 Fed. Appx. 100 (3d Cir.2004); *Soc'y of Lloyd's v. Shields,* 118 Fed.Appx. 12 (6th Cir.2004); *Soc'y of Lloyd's v. Turner,* 303 F.3d 325 (5th Cir.2002); *Soc'y of Lloyd's v. Ashenden et al.,* 233 F.3d 473 (7th Cir.2000); *Soc'y of Lloyd's v. Edelman,* 2005 WL 639412 (S.D.N.Y. Mar.21, 2005); *Soc'y of Lloyd's v. Hudson,* 276 F.Supp.2d 1110 (D.Nev.2003); *Soc'y of Lloyd's v. Byrens,* U.S.

Against this avalanche of prior case-law, Tropp argues that his case is different. However, as explained more fully below, even though Tropp's record may be more extensive, his legal claims do not differ in any material aspect from those of previous Names. Accordingly, we deny Tropp's motion for partial summary judgment, and we grant Lloyd's motion to dismiss the complaint on the basis of improper venue, or, in the alternative, for failure to state a claim.

BACKGROUND

While we concur with the D.C. Circuit that there is no need to reinvent the wheel, we need to provide enough factual background to set forth Tropp's arguments.

Dist. LEXIS 26719 (S.D.Cal. May 29, 2003); *Soc'y of Lloyd's v. Webb,* 156 F.Supp.2d 632 (N.D.Tex.2001); *Soc'y of Lloyd's v. Anderson,* 2004 U.S. Dist. LEXIS 7351 (N.D.Tex. Apr. 27, 2004); *Soc'y of Lloyd's v. Campbell-White,* 2005 U.S.Dist. LEXIS 22403 (D.Mass. Aug. 23, 2005); *Soc'y of Lloyd's v. Grace,* 278 A.D.2d 169, 718 N.Y.S.2d 327 (1st Dep't 2000); *Collins v. Soc'y of Lloyd's,* 874 So.2d 672 (Fla.App. 4 Dist., 2004). Additionally, the following cases enforcing Lloyd's judgments are unreported: *Soc'y of Lloyd's v. Tufts,* No. 03-2316 (E.D.Mo. May 18, 2004); *Soc'y of Lloyd's v. McCarthy,* No. 03-80247-CJV (S.D.Fla. July 16, 2003); *Soc'y of Lloyd's v. Evnen,* 02-CV-118 (D.Neb. Apr. 28, 2003); *Soc'v of Lloyd's v. Davies,* No. 02-CV-1602-GET (N.D.Ga. Apr. 23, 2003), *aff'd* No. 03-13794 (11th Cir. May 21, 2004); *Soc'y of Lloyd's v. Bennett,* No. 02-CV-204TC (D.Utah Nov. 12, 2003); *Soc'y of Lloyd's v. Rosenberg,* No. 02-1195 (E.D.Pa. Aug. 12, 2002); *Soc'y of Lloyd's v. Ellis,* No. 05-159-CA (Fla.Disc.Ct. 4th Dist.2005); *Soc'y of Lloyd's v. Almond,* No. 03CP406076 (S.C. Cir. Ct. Richland 2005). *See* Defendant's Appendix of Unreported Decisions, attached Co the Declaration of Nicholas P. Demery, and filed concurrently with Defendant's Motion to Dismiss.

I. Tropp's Underwriting

A. The Lloyd's Insurance Market

Lloyd's is a 300-year-old market in which individual and corporate underwriters known as "Names" underwrite insurance. "The Corporation of Lloyd's, which is also known as the Society of Lloyd's, provides the building and personnel necessary to the market's administrative operations. The Corporation is run by the Council of Lloyd's,[4] which promulgates 'Byelaws,' regulates the market, and generally controls Lloyd's administrative functions." *Haynsworth v. The Corporation of Lloyd's,* 121 F.3d 956, 958 (5th Cir.1997).[5] *See also Roby v. Corporation of Lloyd's,* 996 F.2d 1553, 1357 (2d Cir.1993) (stating that Lloyd's is a market "somewhat analogous to the New York Stock Exchange"). *See* Lloyd's Acts, 1871-1982,

In order to participate in the Lloyd's market, Names are required by English law to become members of the Society of Lloyd's.[6] As members, they underwrite insurance by joining various "syndicates" which pool and manage investments in assorted risks. While investment in Lloyd's has typically been a "profitable venture,"[7] Names are personally liable

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[4] The Lloyd's Council is elected primarily by Managing Agents of the various syndicates.

[5] *See also* Declaration of Nicholas P. Demery ¶ 3.

[6] Demery Decl. ¶ 5.

[7] *Soc'y of Lloyd's v. Mullin,* 96 Fed.Appx. 100, 102 (3d Cir.2004) ("Underwriting in the Lloyd's market has traditionally been a profitable venture, but Names began to incur substantial losses in the late 1980s and early 1990s.")

on losses incurred by the syndicates that they join, unless they buy a "stop-loss" insurance policy.[8]

Names' underwriting activities are mediated by two sets of agents-Members' Agents and Managing Agents. Members' Agents, somewhat analogous to brokers, open the Names' accounts, place their Names on various syndicates, and generally oversee their Names' underwriting activities. Managing Agents, underwriting specialists, run the day-to-day business operations of each syndicate, and decide which insurance policies to underwrite. Both sets of agents assume contractual responsibilities over Names' underwriting activities, and owe fiduciary duties to the Names.[9]

Each syndicate underwrites insurance for exactly one calendar year, beginning on January 1 and ending December 31. In order to calculate gains and losses, syndicates must stay "open" for at least three years afterwards.[10] After three years, a "closing" syndicate must find a new, open syndicate to reinsure its outstanding liabilities. This type of reinsurance is called "RITC" (reinsurance to close). In exchange for a certain premium, ("RITC premium"), a new syndicate agrees to accept the bundle of all outstanding liabilities from a closing syndicate, including the RITC policies that the closing syndicate itself had underwritten for prior syndicates. Thus, a single new RITC policy may pass down many syndicates' worth of outstanding

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[8] *See* Tropp Decl. ¶¶ 20; 26-30.

[9] Compl. ¶¶ 26-34; *Roby,* 996 F.2d at 1357.

[10] *See* Demery Decl. ¶ 11.

liabilities, thereby exposing new syndicates to potentially vast pre-existing liabilities.

Pursuant to § 14(3) of the Lloyd's Act of 1982, Lloyd's itself, as regulator of the market, is provided with immunity ("Lloyd's Immunity") from suits brought by Names, except for claims of fraud or bad faith. *See, e.g., Soc'y of Lloyd's v. Jaffray,* 2000 WL 1G29463 (Queen's Bench Division (Comm.Court), Nov. 3, 2000) (Creswell, J.) *aff'd* (2002) 146 S.J.L.B. 214(AC), *available at* 2002 WL 1654876 at *1. *See also Bonny v. Soc'y of Lloyd's,* 784 F.Supp. 1350, 1359 (N.D.Ill.1992) ("Lloyd's immunity represents an important English public policy choice."). Members' Agents and Managing Agents, however, do not have such immunity. *See, e.g., Soc'y of Lloyd's v. Robinson,* 1 W.L.R. 756, 767 (House of Lords, 1999).

B. Tropp Becomes a Name

Tropp was recruited to join Lloyd's in 1987 through a Member's Agent named John Hayter.[11] Tropp had recently retired from his job at the United States Agency for International Development, and had worked previously at the Environmental Protection Agency, ("E.P.A.")).

Tropp complied with the various reguirements to become a member of Lloyd's: he passed a means test to ensure he had the ability to meet underwriting obligations, signed the necessary contracts, posted a

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[11] It appears that John Hayter originally worked for Hayter Agencies Ltd., and then later with a firm by the name of Hayter Brockbank.

fully collateralized $160,000 letter of credit,[12] and went through the required screening interview with the Lloyd's Rota Committee on August 11, 1987. (As described by the fifth Circuit: "Names must ... personally appear in London before a representative of the Council of Lloyd's to acknowledge their awareness of the various risks and requirements of membership, and in particular the fact that underwriting in the Lloyd's market subjects them to unlimited personal liability." *Haynsworth,* 121 F.3d at 958-59.

The central contract that Tropp signed with Lloyd's was the "General Undertaking."[13] The General Undertaking obliges Names to comply with all provisions of the Lloyd's Acts, as well as with any current or future Byelaws promulgated by the Council of Lloyd's.[14] Clause 2.2 (the "Choice Clause") requires Names to litigate any and all disputes with Lloyd's in English courts under English law, and also sets forth that the Names agree to personal jurisdiction in England, and that any final judgment against them rendered in England is enforceable in other jurisdictions.[15]

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[12] With leverage, such a letter of credit allowed Tropp to take on risks of up to $640,000.

[13] *See* Tropp Decl. Ex. B. [General Undertaking between Richard A. Tropp and the Society of Lloyd's, effective as of January 1, 1988]; *see also* Demery Decl, Ex. 2 [same].

[14] *Id.*

[15] Clause 2.2 of the General Undertaking reads in pertinent part: "[T]he courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature .... [the Name] irrevocably agrees that a judgment in any Proceeding brought in the English courts shall

Because of his work at the E.P.A., Tropp was sensitive to looming environmental, particularly asbestos-related liabilities, and wished to avoid investing in any syndicates exposed to such environmental risks. Tropp apparently confirmed with the Lloyd's Rota Committee at his screening interview in August, 1987,[16] and again with his Member's Agent both orally and by letter dated September 11, 1987,[17] that he would not be placed on any syndicates exposed to such environmental risks. He also purchased stop-loss insurance. Tropp underwrote insurance through various syndicates for the years beginning on January 1, 1988, January 1, 1989, and January 1, 1990.

In April, 1990, however, things began to unravel. Tropp received back from Hayter Brockbank (his re-named Member's Agent) an uncashed check for his stop-loss insurance policy for his 1990 syndicates.

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be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction," Tropp Decl. Ex. 8 at ¶ 2.2; Demery Decl. Ex. 2 at ¶ 2.2.

[16] Tropp Decl. ¶¶ 12-13. Whereas Lloyd's Rota Committee normally retains minutes, transcripts, and tape recordings of Rota Committee meeting, Lloyd's has represented to Tropp that no such evidence can be found with respect to his August 11, 1987 interview. *Id.*

[17] Tropp. Decl Ex. F [Letter from Richard A. Tropp to John Hayter, dated September 11, 1987] ("This letter is to reconfirm ... that you have placed me on no syndicate, under any circumstances, which either is or could become exposed to environmental liability of any kind. This is an absolute condition to my joining Lloyd's, to my approving the Syndicate Arrangements enclosed, and to my underwriting for all future years, and I rely on your assurance-per our discussions on this-that none of the syndicates onto which the agency places me will ever carry such potential liability.")).

Hayter Brockbank told Tropp that stop-loss insurance was no longer available. Tropp now maintains that this was a lie, since Hayter Brockbank's directors and officers had in fact procured stop-loss insurance to cover themselves for 1990 syndicates.[18]

Upon learning that he was no longer covered by stop-loss insurance, Tropp immediately tried to stop underwriting. Tropp called Hayter Brockbank and orally resigned for the following year, beginning January 1, 1991. But, apparently because Tropp was an army-reservist called up to active military duty, he did not send written notice of his resignation until months later, on August 3, 1990. At that time, Hayter Brockbank refused to recognize his resignation for 1991-again fraudulently according to Tropp[19]-because they maintained that resignations must be made in writing by the end of June, at least six months prior to the start of the next calendar year. Therefore, Hayter Brockbank again placed

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[18] *See* Tropp Decl. ¶ 15.

[19] Tropp Decl. ¶¶ 16-17. Tropp maintains that Lloyd's Byelaws only require four months notice before a resignation becomes effective. Lloyd's counters that Tropp erred by sending his August 3, 1990 letter only to Hayter Brockbank, and not to Lloyd's itself. Demery Decl. ¶ 12. Had Tropp written to Lloyd's itself, on August 3, 1990, the letter would have amounted to effective resignation. But, under Lloyd's Byelaws, Members' Agents are not authorized officers or employees of Lloyd's for purposes of accepting resignations.

Tropp on syndicates for the 1991 year, again without stop-loss insurance.[20]

C. Collapse of the Insurance Market

Tropp's loss of stop-loss insurance, and his having been, in his words, "conscripted" to underwrite for another year could not have come at a worse time. Beginning in the early 1990s, syndicates at Lloyd's were wracked by staggering losses of upwards of twelve billion dollars.[21] *Ashenden,* 233 F.3d at 478 ("Huge underwriting losses [ ] threatened to destroy the London insurance market"). The losses were due in large part to previously incurred but not yet reported environmental liabilities, which had cascaded down from previous syndicates through RITC reinsurance.

As the losses began to mount, Tropp received cash calls on his letter of credit in 1992, and then again in 1993,[22] to which he consented.[23] He then received a third cash call in 1994, which would have drained his original investment of $160,000 down to

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[20] Tropp's resignation appears to have been effective at least for the 1992 calendar year. There is no evidence of any losses from 1992 syndicates.

[21] The $12 billion figure comes from Lloyd's itself. Demery Decl. ¶ 14. *See also Edelman,* 2005 WL 639412 at *3. A 1995 New York State Insurance Department audit of Lloyd's for the period ended December 31, 1993 found an $18.4 billion deficiency. A copy of the report is available at www.truthaboutlloyds.com/regulation/ nyidreport.html.

[22] Tropp Decl. ¶ 18, Cash calls were typically made by Member's Agents, based on information provided to them by the managing agents for each of the Name's respective syndicates. *See also* Demery Decl. ¶ 12.

[23] Tropp Decl. ¶ 9.

zero, and, according to Tropp, forced a second mortgage on his home.[24]

But, rather than accept the last cash call, Tropp began investigating. Tropp managed to inspect the accounts of six of his largest-loss syndicates.[25] He also hired a forensic accountant, who determined that approximately 98-99% of Tropp's alleged losses stemmed from his being placed on syndicates which, *ultra vires* of his entering prohibition, were exposed to environmental risks through RITC policies.[26] According to Tropp, some of his syndicates were not underwriting any new policies at all, but only writing RITC reinsurance of earlier syndicates, which had been exposed to massive environmental risks. In addition, Tropp further learned that his Member's Agent had received "placement fees" for placing him on these risky RITC-heavy syndicates.[27]

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[24] Tropp Decl. ¶ 19. We, like previous courts in Names' cases, remain sympathetic to the situation that Names found themselves in. As one English court put it:

> It is easy to understand the depth of feeling of those names who became members of Lloyd's between 1977 and 1987. They joined Lloyd's at a time when there were many syndicates infected with asbestos-related risks which were persistently underestimated. The procedure at Lloyd's was that each year's accounts were, at the end of a three-year period, closed into the next year's accounts. The effect was that the new names inherited Losses of massive proportions.

Soc'y of Lloyd's v. Jaffray, (2002) 146 S.J.L.B. 214(AC), *available at* 2002 WL 1654876 at *1.

[25] Tropp Decl. ¶¶ 21-25.

[26] Tropp Decl. ¶ 24.

[27] Tropp Decl. ¶ 22.

Tropp then began negotiating with Lloyd's for a settlement. Tropp claims that he reached an agreement in principle with senior Lloyd's management in November, 1995, and was sent a "Settlement and Release Agreement" on December 11, 1995 that would have absolved him of liability.[28] Before any such agreement was formally executed, however, the Lloyd's Council announced its massive Reconstruction and Renewal Plan ("R & R") which applied mandatorily to all Names.

D. Lloyd's R & R

The Lloyd's Council enacted the Reconstruction and Renewal plan ("R & R") to protect both those who had purchased insurance from Lloyd's and the Names themselves, who might otherwise face unlimited personal liability. *See generally Ashenden,* 233 F.3d at 478.[29] R & R had two major components.

First, Lloyd's syndicates transferred all "open" liabilities for 1992 and preceding years onto a new special-purpose entity called Equitas, which would reinsure those risks.[30] In order to pay for this reinsurance, Equitas assessed on each Name a premium (the "Equitas Additional Premium"), which was individually calculated based on the Name's

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[28] Tropp Decl. ¶ 25.

[29] For other descriptions of R & R, see *Allen,* 94 F.3d at 929-31; *Haynsworth,* 121 F.3d at 958-61 *Roby,* 996 F.2d at 1357.

[30] Tropp Decl. ¶ 30; Demery Decl. ¶ 15. Officially, Equitas is a holding company, owned by a trust, the beneficiaries of which are the reinsured Names, but the trust itself is controlled by the Lloyd's Corporation. *Id.*

current and projected future losses.[31] Equitas then assigned the right to collect these premiums to Lloyd's.[32]

Second, Lloyd's sent a "Settlement Offer" to each Name, whereby Names could agree to pay a discounted amount of moneys allegedly owed in exchange for a release from future liabilities. The Settlement Offer contained a "Finality Statement," which set forth the aggregate amount required to satisfy the Name's prior unpaid underwriting liabilities (if any) and the Equitas Additional Premium. The Finality Statement also included an individually calculated package of "settlement credits" that each Name who accepted the Settlement Offer by a certain date could use to reduce the amount owed.[33]

Tropp received his Finality Statement in August, 1996. It called for him to pay £ 253,409 in uncalled accrued cash calls (with interest) from his 1989, 1990, and 1991 syndicates, as well as £ 114,439 for his Equitas Additional Premium, a total of

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[31] Technically, Names were assessed an "Equitas Premium," but only had to pay the amount by which the "Equitas Premium" exceeded their reserves with Lloyd's, hence tbeir "Equitas Additional Premium." *See, e.g.,* Lloyd's Memorandum of Law at 17 n. 13; Tropp Decl. Ex. Z [Lloyd's Statement of Reinsurance issued to Mr. RA Tropp]. For the sake of convenience and brevity, we refer exclusively to the "Equitas Additional Premium."

[32] Demery Decl. ¶ 20; *Reinhart,* 402 F.3d at 991.

[33] Demery Decl ¶ 15; *Allen,* 94 F.3d at 927. In order to receive the settlement credits, Names had to agree to release not only Lloyd's, but also their Member's Agents, Managing Agents, and other market participants. *Id.*

£ 367,848.[34] Tropp was also offered £ 291,077 in settlement credits, meaning he would have to pay only £ 86,771 if he accepted the Settlement Offer.[35]

Names were given until September 11, 1996 to accept. Although the Settlement Offer was optional, Lloyd's exercised its regulatory authority to require all Names to reinsure outstanding liabilities with Equitas and pay the Equitas Additional Premium by September 30, 1996.[36] Lloyd's did so pursuant to its authority under § 18(b) of Schedule 2 of the Lloyd's Act of 1962 to appoint "substitute agents" for the Names whenever the Lloyd's Council deemed it necessary. Through a series of Bye-laws and resolutions under this act, the Lloyd's Council appointed an entity known as "AUA9" (Additional Underwriting Agencies (No. 9) Ltd.) as a "substitute agent" for the Names.[37] In turn, AUA9 signed the Equitas Reinsurance Contract ("Equitas Contract") with Lloyd's on behalf of all Names.[38]

According to Lloyd's, close to 95% of all Names agreed to the Settlement Offer by September 11, 1996.[39] A few Names, including Tropp, did not ("non-accepting Names").[40] It appears that Tropp refused

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[34] Tropp Decl. ¶ 34; Demery Decl. ¶ 16.

[35] Demery Decl ¶ 16.

[36] Demery Decl. ¶ 18; *Turner*, 303 F.3d at 327-28.

[37] *See* Byelaw No. 82 of 1995; AUA9 Resolution of 1996. The sole shareholder of AUA9 is the Society of Lloyd's. *Siemon-Netto*, 457 F.3d at 97.

[38] Demery Decl. ¶ 18.

[39] Demery Decl. ¶ 17; *Society of Lloyd's v. Ashenden*, 233 F.3d at 478.

[40] While Lloyd's maintains that only about five percent of the Names did not accept their Settlement Offer, Tropp

to pay for a variety of reasons-he believed that the numbers in his Finality Statement were incorrect and overstated; he felt that the purported release would be ineffective since Lloyd's reserved the right to collect future shortfalls even from those Names who accepted;[41] but most of all Tropp was still engaged in his own negotiations concerning a personal settlement for far less.

Indeed, Tropp appears to have been engaged in negotiations with Lloyd's throughout the entire time period from 1995 to 2001. The parties seem to have drawn the closest a few years later, in 1998. For instance, Tropp received a letter dated July 9, 1998 from the Head of Lloyd's Financial Recovery Department "reconfirming" that once the necessary paperwork was complete, Lloyd's would release Tropp in exchange for a payment of only $5,000.[42] Tropp later received similar letters confirming a settlement of £ 3,125 (approximately $5,000 at the time) on January 25, 2001, and March 15, 2001.[43] However, unfortunately for Tropp, the necessary paperwork was never completed.[44]

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believes the number may be slightly higher. Tropp Decl, ¶ 33 n. 2.

[41] *See* Tropp. Decl ¶¶ 31-32.

[42] Tropp Decl. ¶¶ 35-37; Ex. L [Letter from Phillip R. Holden to Richard A. Tropp dated July 9, 1998].

[43] Tropp Decl. ¶¶ 35-37; Ex. M [Letters from Sarah Wilton, Financial Controller at Lloyd's to Richard A. Tropp dated January 25, 2001, and March 15, 2001].

[44] The ultimate reasons why a settlement was never finalized are missing from the record. The courts in England were sympathetic to Tropp's near-settlement, but found his legal estoppel argument unavailing. *See e.g., Tropp v. Soc'y of Lloyd's* [2004] EWCA Civ. 1544 (Waller, J.) at ¶ 20 ("I have to

II. Legal Proceedings Arising From Lloyd's R&R

A. Lloyd Enforces the Equitas Premium

Lloyd's brought suits for breach of contract against non-accepting Names. Lloyd's efforts to collect were aided by two highly controversial clauses in the Equitas Contract-the "pay now, sue later" clause, and the "conclusive evidence" clause. The "pay now, sue later" clause forbid Names, in suits brought by Lloyd's, from raising any claims for set-off or fraud on the part of Lloyd's. Instead, Names had to press such claims in a separate proceeding, where the claims were denoted as "counterclaims." The "conclusive evidence" clause made Lloyd's determination of the amount of a Name's Equitas Additional Premium conclusive "in the absence of manifest error."

Non-accepting Names challenged the Equitas Contract, and specifically the "pay now, sue later" and "conclusive evidence" clauses, but to no avail.[45]

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say that I have some sympathy with Mr. Tropp on that, as far as I have looked at the correspondence. But one thing is clear, and that is that the judge was right in law [that Tropp could not assert estoppel.]"). *See also soc'y of Lloyd's v. Tropp* [2004] EWHC 1397 (Comm.) (Gross, J.) at ¶ 46 (noting that Tropp and Lloyd's were "within a whisker" of settlement, and "it is a matter to be much regretted .. [that they] drew further apart.").

[45] *See* Demery Decl. ¶ 22. The defenses of the recalcitrant Names included that Lloyd's lacked the regulatory authority to require Names to purchase reinsurance from Equitas; that Lloyd's lacked the regulatory authority to appoint substitute agents to negotiate on behalf of Names; that Lloyd's lacked proper title to sue; that Names were entitled to litigate fraud in

Lloyd's won across the board, and courts unanimously upheld the validity of the Equitas Contract despite the fact it had only been signed on the Names' behalf by substitute agent AUA9. *See generally Soc'y of Lloyd's v. Ashenden,* 233 F.3d 473; *Soc'y of Lloyd's v. Leighs,* [1997] C.L .C. 759(QBD) *available at* 1997 WL 1104333, *aff'd, Soc'y of Lloyd's v. Lyon, Leighs & Wilkinson,* [1997] C.L.C. 1398 *available at* 1997 WL 1104500.

After winning judgments in England, Lloyd's sought to enforce judgments against non-accepting American names in United States courts. American Names fought the enforceability of the English judgments, contending that the pay-now-sue-later clause and the conclusive evidence clause deprived Names of due process of law, and rendered the English judgments unenforceable here. American Names also lost these challenges across the board. *See, e.g., Soc'y of Lloyd's v. Ashenden,* 233 F.3d at 479-481; *Soc'y of Lloyd's v. Edelman,* 2005 WL 639412 at * 4-6 (S.D.N.Y. Mar.21, 2005) (collecting cases and noting that Names had already lost challenges to English judgments in fourteen separate federal and state courts.)

B. Tropp's Legal Proceedings

Apparently since Tropp and Lloyd's were still negotiating, Lloyd's did not bring suit against Tropp in the first wave of enforcement actions in 1997 and 1998. But, as the parties never reached a final

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the inducement; and that Names were not bound by the "pay now, sue later" or the "conclusive evidence" clauses of the Equitas contract.

settlement, Lloyd's eventually sued Tropp on August 22, 2002 in the High Court of Justice, Queen's Bench Division.[46] Lloyd's sought £ 433,560.19, representing Tropp's unsatisfied underwriting liabilities, his unpaid Equitas Additional Premium, interest and costs.[47]

After yet another round of settlement talks failed,[48] Tropp moved to dismiss the complaint on April 26, 2003 for lack of proper service.[49] (Like other Names, Tropp was only served by means of his "substitute agent," the same AUA9 entity that had signed the Equitas Contract on his behalf.) The court denied Tropp's motion by order dated January 20, 2004.[50]

On May 14, 2004, Tropp filed his "Defence and Counterclaim."[51] Tropp argued *inter alia* that the Equitas Equitas Contract was invalid because it was

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[46] Demery Decl. ¶ 23.

[47] Interestingly, the amount claimed by Lloyd's, pre-interest and costs, was less than the amount on Tropp's Finality Statement. Apparently, Lloyd's did not sue Tropp for his "Central Fund Debt," one alleged component of the unpaid underwriting obligations. *See* Demery Decl. ¶ 25.

[48] Tropp Decl. ¶ 38; Demery Decl. ¶ 23. A sticking point appears to have been that Lloyd's was only willing to settle with respect to itself, whereas Tropp insisted that any settlement cover Lloyd's, Equitas, and any other subsidiary or affiliate.

[49] Tropp Decl. ¶ 39; Ex. N. [Tropp's Statement of the Case]. Tropp argued that Lloyd's had only served a local member's agent, wholly controlled by Lloyd's, and Tropp himself had never been properly served.

[50] Tropp Decl. Ex. O [*Soc'y of Lloyd's v. Tropp* (2004) EWHC 33 (Comm.) (Gross, J.)]]; Demery Decl. Ex. 5 [same].

[51] Tropp Decl. Ex. P. [Tropp's Defence and Counterclaim].

signed by AUA9 on his behalf;[52] that his purported losses stemmed from risks that he had not agreed to underwrite, either because he refused from the inception to underwrite environmental risks or because he timely resigned from the 1991 syndicates;[53] that the Managing Agents of his syndicates were engaged in fraud and self-dealing in underwriting RITC policies exposed to massive environmental liabilities, and in churning Names' accounts;[54] that Lloyd's was aware of the Managing Agent's fraud and systematically failed to prevent it[55] and also that Lloyd's was in possession of substantial funds that should have been credited to Tropp's account but had not been, including his stop-loss insurance proceeds of £ 28,331.29 for his 1989 syndicates, various proceeds of other successful syndicates, proceeds from various Names' litigations against Managing Agents, and certain surpluses owing from Equitas to Lloyd's which Tropp maintained had never been properly accounted for.[56]

Following submission of written argument, documentary evidence, and oral argument by both parties, on May 24, 2004 the High Court of Justice, Queen's Bench Division granted summary judgment in favor of Lloyd's.[57] The court entered a 22-page opinion which summarized Tropp's arguments and

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[52] Tropp Decl. Ex. P at ¶¶ 3-9.

[53] Tropp Decl. Ex. P at ¶¶ 22-24.

[54] Tropp Decl. Ex. P at ¶¶ 13-20.

[55] Tropp Decl. Ex. P at ¶ 38.

[56] Tropp Decl. ¶¶ 40-74; EX. P at ¶¶ 25-28.

[57] Compl, ¶¶ 147, 149; Tropp Decl. Ex. AD [*Soc'y of Lloyd's v. Tropp* [2004] EWHC 1397 (Comm.) (Gross, J.)]; Demery Decl. Ex. 6 [same].

the research he had done, but found that Tropp's objections to the Equitas Contract were precluded by earlier case-law;[58] that Tropp's allegations of malfeasance on the part of his Member's Agent and Managing Agents did not properly lie against Lloyd's, since Names themselves bore the risk of negligence or mismanagement on the part of their Agents;[59] and, ultimately, in light of the "conclusive evidence" clause and the "pay now, sue later" clause, Tropp's allegations against Lloyd's were not sufficiently plausible or well-plead to meet the applicable standard of "manifest error" in the amount claimed by Lloyd's.[60] Accordingly, the court entered an order in the amount of £ 463,881.29, representing principal and interest owed to Lloyd's.[61]

Tropp then sought permission to appeal. Following another round of briefing, and another hearing, a judge of the Court of Appeals denied Tropp permission to appeal on November 2, 2004.[62]

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[58] Tropp Decl. Ex. AD at ¶¶ 16.

[59] Tropp Decl. Ex. AD at ¶¶ 16(1); 18 ("[C]omplaints about whether the Managing Agents were properly running the syndicate's business ... do not lie against Lloyd's.").

[60] Tropp Decl. Ex. AD at ¶¶ 17-18. Thus, the court concluded that "most of Tropp's arguments are ... hopeless."

[61] Tropp Decl. Ex. AE [Order]; Demery Decl. Ex. 7 [same]. We note again that the court appears to have had much sympathy for Tropp's plight, and expressed regret that a settlement between Tropp and Lloyd's was never reached. The court examined the settlement documents and concluded that the parties were "within a whisker" of settlement, and "it is a matter to be much regretted .. [that they] drew further apart." Tropp Decl. Ex. AD at ¶ 46.

[62] Compl. ¶ 149; Tropp Decl. Ex. AF [*Tropp v. Soc'y of Lloyd's* [2004] EWCA Civ. 1544 (Waller, J.)]; Demery Decl. Ex. 8 [same].

The appeals judge concurred with the court below that Tropp's challenge to the Equitas Contract as a whole was fruitless, since his claims regarding his entering prohibitions, being wrongly conscripted into underwriting for 1991, and fraud on the part of his Managing Agents in underwriting certain RITC policies lay properly against his Member's Agent or Managing Agents, not against Lloyd's.[63] In this light, Tropp's allegations against Lloyd's failed to state a plausible claim of "manifest error" in Lloyd's calculations.

Next, unlike many American Names who later challenged English judgments in American courts, Tropp fought on. He pursued his counterclaim against Lloyd's in a separate proceeding,[64] maintaining that Lloyd's acted fraudulently and in bad faith, in particular by turning a blind eye on Managing Agents' RITC practices, which, in Tropp's account, were more like a Ponzi scheme than a legitimate investment. Tropp alleged "a systematic institutional performance failure by Lloyd's ... in turning its head to and consciously avoiding ... wrongful behavior by particular agencies which

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[63] Tropp Decl. Ex. AF at ¶¶ 8-21. Indeed, Justice Waller concluded by suggesting that although Tropp would be disappointed by his decision to deny him leave to appeal, he believed that he was in fact doing Tropp a favor because an appeal would simply ratchet up the fees and costs that Lloyd's could eventually saddle onto Tropp. Tropp Decl. Ex. AF at ¶ 25.

[64] Compl. ¶ 149.

victimise Mr. Tropp and others on his particular syndicates."[65]

Following yet another round of written and oral arguments, and the submission of testimonial and documentary evidence, on November 5, 2004, the High Court of Justice struck Tropp's counterclaim.[66] The Court noted that while Tropp may have stated claims against his Member's Agent and Managing Agents, Lloyd's itself was not liable for the acts of those agents.[67] Further, Lloyd's was protected from suits for mere negligence by "Lloyd's Immunity" under section 14(3) of the Lloyd's Act of 1982, and any of Tropp's claims against Lloyd's that alleged more than negligence, i.e. actual fraud or bad faith on the part of Lloyd's, were not sufficiently well-plead and had no discernible prospect for success.[68]

Tropp sought leave to appeal the dismissal of his counterclaim on the grounds that the lower court had applied Lloyd's Immunity too broadly. In conjunction with his appeal, Tropp performed extensive research which showed that Parliament had only intended "Lloyd's Immunity" to protect Lloyd's acting in its public capacity as regulator of the insurance market, not in its private capacity as

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[65] Tropp Decl. Ex. P (Tropp's Defence and Counterclaim) at ¶ 25. *See also* Tropp Decl. Ex. AG [*Soc'y of Lloyd's v. Troon* [2004] EWHC 3335 (Comm) (Gloster, J.)] at ¶ 5.

[66] Tropp Decl. Ex. AG. The court also denied Tropp leave Co amend his complaint so as to add numerous other parties, including his Managing Agent and his Member's Agent.

[67] Tropp Decl. Ex. AG at ¶ 10.

[68] Tropp Decl. Ex. AG at ¶¶ 2, 17, 25. The court also dismissed Tropp's claims against Lloyd's for libel and slander as "unfounded."

an institution; and that Lloyd's Immunity applied only to suits for damages, not suits seeking equitable remedies.[69] Tropp forcefully presented these arguments in his appeal, but on January 23, 2006 a judge of the Court of Appeals denied Tropp permission to appeal.[70] The judge commended Tropp's "redoubtable" research, but held that, even assuming *arguendo* that Tropp was correct, his counterclaim failed because his claim against Lloyd's *was* against Lloyd's in its public capacity as regulator of the insurance market,[71] and even though Tropp nominally sought equitable remedies such as a declaration, unwinding and disgorgement, his claims were in essence claims for monetary damages against Lloyd's.[72]

On April 27, 2006 Tropp petitioned the House of Lords for review of the Court of Appeals decision,[73] but his petition was denied by decision dated July 18, 2006.[74]

C. The Instant Suit

Tropp acknowledges that he has not paid Lloyd's judgment against him.[75] Upon receiving

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[69] Tropp Decl. ¶¶ 92-91; Ex. AH [*Soc'y of Lloyd's v. Tropp* [2006] EWCA Civ. 88 (Rix, J.)] at ¶ 21-23; Demery Decl. Ex. 10 [same].

[70] *Id. See also* Compl. ¶¶ 150, 151,

[71] Tropp Decl. Ex. AH at ¶ 22.

[72] Tropp Decl. Ex. AH at ¶ 23.

[73] Tropp Decl. Ex. AJ [Tropp's Petition to the House of Lords].

[74] Compl. ¶ 153; Tropp Decl. Ex. AK [*Tropp v. Soc'y of Lloyd's* [2006] Parl. Deb. H.L. (5th ser.) (2006) (July 16, 2006)].

[75] Compl. ¶ 154.

correspondence from Lloyd's suggesting that Lloyd's would seek to have its English judgment enforced in the United States,[76] Tropp filed the instant suit on January 18, 2007.

Tropp has now moved for partial summary judgment on his claim for a declaratory judgment that the English judgment is unenforceable here, and Lloyd's has moved to dismiss under both Fed.R.Civ.P. 12(b)(3) and 12(b)(6). After extensive briefing from both parties, this Court held oral argument on these crossmotions on December 7, 2007.

DISCUSSION

I. Applicable Law

A. Summary Judgment

Tropp's motion for partial summary judgment under Fed.R.Civ.P. 56(c) may only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ, P. 56(c). *See, e.g., Ainaker v. Foley,* 274 F.3d 677, 632 (2d Cir.2001).

B. Motions to Dismiss

For the purposes of Lloyd's motion to dismiss under Fed.R.Civ.P. 12(b)(3) for improper venue,

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[76] Tropp Decl. Ex. AL [Email from Ian Bradford, Lloyd's Legal & Compliance to Tropp, dated January 16, 2007].

given the forum-selection clause in the General Undertaking, Tropp bears the burden of making a *prima facie* showing by alleging facts which, if true, would support the court's exercise of jurisdiction. *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2d Cir.1981); *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG,* 121 F.3d 24, 29 (2d Cir.1997). When analyzing this preliminary showing, the facts must be viewed in the light most favorable to the plaintiff. *Id.*

In considering Lloyd's motion to dismiss for failure to state a claim under Fed. R. Civ. P(12)(b)(6), this Court must accept as true the facts alleged in the complaint. *Bolt Elec., Inc. v. City of New York,* 53 F.3d 465, 469 (2d Cir.1995), drawing all reasonable inferences in favor of the plaintiff. *See Freedom Holdings, Inc. v. Spitzer,* 357 F.3d 205, 216 (2d Cir.2004). However, conclusory allegations and legal conclusions disguised as facts will not suffice to prevent a motion to dismiss. *See De Jesus v. Sears, Roebuck & Co.,* 87 F.3d 65, 69 (2d Cir.1996). Dismissal will be appropriate if the plaintiff has failed to "provide the grounds upon which [his] claim rests through factual allegations sufficient to raise a right to relief above the speculative level." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir.2007) (internal quotation marks omitted).

C. English Judgments

In the context of either of these cross-motions we may consider the various the decisions of the English courts as well as English statutes, either by means of judicial notice, *see Lady Nelson. Ltd. v. Creole Petrol Corp.,* 286 F.2d 684, 686 (2d Cir.1961) (taking

judicial notice of an English statute), or because these statutes and decisions were incorporated by reference in Tropp's complaint. *See Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir.1995) (per curiam) ("The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference") (quotations omitted); *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Co.*, 75 F.3d 801, 809 (2d Cir.1996); *see also* Fed.R.Civ.P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). Further, "even where a document is not incorporated by reference," this Court may nevertheless consider it where the complaint "relies heavily upon its terms and effect," which renders the document "integral" to the complaint, *Int'l Audiotext,* 62 F.3d at 72; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir.2002).[77]

II. The Choice Clause and Forum Selection

The first question presented by these motions is whether Tropp may pursue claims for relief against Lloyd's in this forum. In the Choice Clause of his General Undertaking, Tropp "irrevocably agree[d] that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy

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[77] For the sake of completeness, we also note that for the purposes of Lloyd's motion to dismiss under Fed.R.Civ.P. 12(b)(3) for improper venue, we may also consider any documents outside the pleadings that are relevant to the question of venue. *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG,* 121 F.3d 24, 30 (2d Cir.1997).

of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's."[78]

Forum selection and choice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Roby*, 996 F.2d 1362-63 (noting that forum selection and choice of law clauses eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws). This presumption of validity may be overcome, however, by a clear showing that the clauses are "unreasonable" under the circumstances. *The Bremen*, 407 U.S. at 10. The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state. *See The Bremen*, 407 U.S. at 10, 15, 18; *Roby*, 996 F.2d at 1363. Thus, the burden is on Tropp to make a *prima facie* showing that one of these factors renders the forum selection clause unreasonable.

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[78] *See* Tropp Decl. Ex. B [General undertaking] at ¶ 2.2.

We note that not only one but two Second Circuit panels have held that the Choice Clause in the General Undertaking is enforceable against American Names. *See Roby v. Corp. of Lloyd's,* 936 F.2d 1353, 1363 (2d Cir.1996) (affirming the district court's dismissal of Securities Act, Securites Exchange Act, and RICO claims brought by Names against Lloyd's on the basis of improper venue pursuant to the Choice Clause); *Stamm v. Barclay's Bank of N.Y.,* 153 F.3d 30, 32-33 (2d Cir.1998) (reaffirming *Roby* and holding that the Choice Clauses are enforceable). Moreover, all seven other federal circuits to reach this issue have likewise held that the Choice Clause is not unreasonable.[79]

Applying this test, and following the *Roby* and *Stamm* courts, we easily dispose of the first two factors. First, Tropp does not contend that he was fraudulently induced into agreeing to the Choice Clause. Second, Tropp cannot argue that it is too inconvenient for him to litigate in England, as he has already done so extensively.

Tropp rests heavily on the third factor, that the Choice Clause will in effect deny him any remedy.[80] As construed by the Second Circuit, the inquiry under the third factor is whether the designated

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[79] *See Lipcon v. Underwriters at Lloyd's,* 148 F.3d 1285 (11th Cir.1998); *Richards v. Lloyd's of London,* 135 F.3d 1289 (9th Cir.1998) (en banc); *Haynsworth v. Corp. of Lloyd's,* 121 F .3d S5G (5th Cir.1997); *Allen v. Lloyd's of London,* 94 F.3d 923 (4th Cir.1996); *Shell v. R.W. Sturge, Ltd.,* 55 F.3d 1227 (6th Cir.1995); *Bonny v. Soc'y of Lloyd's,* 3 F.3d 156 (7th Cir.1993); *Riley v. Kingsley Underwriting Agencies Ltd.,* 969 F.2d 953 (10th Cir.1992).

[80] *See* Tropp Reply Memorandum of Law at 4-5.

forum is inherently unfair or biased, or denies all remedies whatsoever. "It is not enough that the foreign law or procedure merely be different or less favorable than that of the United States. Instead, the question is whether the application of the foreign law presents a danger that the [ ] Names will be deprived of any remedy or treated unfairly." *Roby,* 996 F.2d at 1363 (emphasis in the original) (citing *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254-55, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)).

The fourth factor, whether the choice clause contravenes a strong public policy of the forum state,[81] is closely related to the third factor because Tropp argues that the application of English law would contravene New York's strong public policy of permitting claims to be heard on their merits.[82]

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[81] Under this factor, the Names in both *Roby* and *Stamm* had argued that the Choice Clauses were unenforceable because they served as a prospective waiver of the protections of the Federal securities laws, and pursuant to section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, and section 23(a) of the Securities Exchange Act of 1334, 15 U.S.C. § 78cc(a), such waivers are void and unenforceable. Indeed, the SEC submitted a brief in *Stamm* urging that Choice Clauses should be found to be unenforceable. However, the court in *stamm* clarified that the relevant inquiry as to whether the Choice Clauses indeed waived the protections of the securities laws was the availability of adequate remedies for fraud in England. 153 F.3d at 33. Thus, apparently, Tropp does not raise any argument that the Choice Clause amounts to a waiver of the securities laws, and instead concentrates his argument on the availability of remedies, or lack thereof of, in England.

[82] Tropp Memorandum of Law at 20-21. Tropp makes this argument in the context of the Recognition Act, but we consider it here. The other public policy argument that Tropp makes in the context of the Recognition Act-that the Equitas Contract

Indeed, Tropp is correct insofar as, under either the third or fourth factors, the availability of adequate remedies in England was central to the holdings in *Roby* and *Stamm*. *Roby* held that, "We are satisfied ... that the Names have several adequate remedies in England to vindicate their substantive rights," 996 F.3d at 1364-65, and cautioned, "[w]e believe that if the *Roby* Names were able to show that available remedies in England are insufficient ... we would not hesitate to condemn the [Choice Clauses] as against public policy."). *Id.* In the same vein, *Stamm* acknowledged that the availability of remedies in England was the central holding in *Roby:* "our holding in *Roby* ... primarily rested upon the adequacy of English law to deter fraud and misrepresentation, to encourage full disclosure, and to provide plaintiffs remedies in the event of a fraud.... English law remains adequate to discourage fraud and misrepresentation, and to provide Plaintiff with a remedy should a fraud be proven." *Stamm,* 153 F.3d at 33.

In his effort to distinguish what would otherwise be binding precedent, Tropp argues that the analysis of earlier American courts rested on mistaken premises, since these courts did not have before them, and could not have anticipated, the decisions of the English courts dismissing Tropp's counterclaims on the basis of Lloyd's Immunity. According to Tropp's reading of precedent, previous American courts had only been confronted with

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violates New York contract principles because it was signed by AUA9 on behalf of the Names-is less relevant here, as it goes more to whether the judgment itself, as opposed to the Choice Clause, contravenes New York public policy.

Lloyd's cases in which American flames had not exhausted their remedies, and these courts upheld the validity of the Choice Clause because they understood that the Names would still be able to pursue remedies for fraud or mount defenses by means of counterclaim.[83] But the decisions of the English courts in Tropp's case, he argues, particularly the application of Lloyd's Immunity, show that English law leaves Names without *any* actual remedy. Thus, because he exhausted remedies, Tropp argues that his record is the first complete record before an American court showing a total denial of due process, i.e. that there were no remedies available for fraud, and there was no available forum in England wherein he could present the merits of his claims.[84]

Tropp acknowledges that the English courts, while rejecting his claims against Lloyd's, stated that he could pursue separate claims against his

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[83] As Tropp writes, "All Federal circuits have relied on what they understood to be U.S. defendants' voluntary waiver of their rights to *pre*-judgment UK due process in defense, but no U.S. court has ever had before it a record which could have shown it the unavailability for *post*-judgment UK remedies in counterclaim as well" Tropp Memorandum of Law at 5 (emphasis in the original).

[84] Tropp thus urges that Lloyd's pulled off a "bait and switch"; "When confronted with claims of lack of due process, Lloyd's, in those other [American] cases, pointed to all the remedies that it claimed existed in the UK that gave the hundreds of defendants ample opportunity to have their claims heard. But, in plaintiff's case, Lloyd's successfully took the position in the UK that those alternative remedies did not exist, even though it had assured U.S. courts in those other cases that those same remedies were available to members." Tropp's Memorandum of Law at 2.

Member's Agent or Managing Agents. Thus, a key element of Tropp's argument here is his contention that any legal claims he might have had against Member's Agents or Managing Agents were "not realizable in practice" because, as part of R & R, Lloyd's granted itself the right to take the proceeds of any such actions brought by Names against these Agents. According to Tropp, when Lloyd's takes the proceeds of these suits, it crosscollateralizes the money and holds the money for seventy years to offset Names' potential future liabilities.[85] Tropp then points out, again, that previous American decisions such as *Roby* had assumed that suits against Members' Agents and Managing Agents were an alternative avenue open to the Names to pursue remedies in England. *See, e.g., Roby,* 996 F.2d at 1365-56.

Tropp's arguments, however, do not withstand scrutiny. A close reading of Tropp's litigation in England shows that he was not denied any remedy, rather he simply was not victorious on the merits of his claims. When he presented his counterclaims, the court struck them not because relief was never available, but rather because Tropp's particular claims of fraud were not sufficiently well-plead to avoid the bar on negligence suits interposed by Lloyd's Immunity. In short, Tropp's evidence of fraud was found to be insufficient.

It is true that Lloyd's Immunity is a curtailment of possible remedies for the Names, but all legal systems employ certain doctrines that narrow the

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[85] *See* Oral. Arg. Tr., Dec. 7, 2007, 30:7-15.

kinds of claims that can be brought, or prevent certain claims from being addressed on the merits. For example, statutes of limitations present time-bars, privileges such as the attorney-client privilege may deprive a plaintiff from procuring crucial evidence, and immunities for public and quasi-public bodies such as absolute immunity for prosecutors prevent certain suits *ab initio*. Moreover, the particular immunity at play in this case has been part of English law since 1982. Thus, at the time *Roby* and *Stamm* were decided, and certainly *Ashenden,* as discussed more extensively below, it was well-understood by previous American courts that Lloyd's would enjoy immunity for suits other than for fraud.

We note further, although the point is not dispositive to our holding, that Tropp's protestations about the inability to sue his Member's Agent or Managing Agents appear to be vastly overstated (even understanding the facts in the light most favorable to Tropp).[86] It is undisputed that the proceeds of suits against agents accrue to Lloyd's in the first instance, but Lloyd's maintains that the proceeds are only held to cover the individual Name's outstanding liabilities, should there be any, much like a security interest.[87] Thus, the proceeds of any suit Tropp brought against his agents stilts would not be commingled with other Names' proceeds, they *would* be used to offset Tropp's individual underwriting liabilities, and to the extent

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[86] For Tropp's argument, see Tropp Memorandum of Law at 17-18.

[87] Demery Decl. ¶ 35.

Tropp recovered any excess, he could collect in cash. Although Tropp disagrees with this understanding, it is the sworn testimony of Lloyd's in this case,[88] it is the understanding of all previous American courts,[89] and, pivotally, it is the understanding of the House of Lords itself; which decided that Lloyd's could retain such proceeds. As the House of Lords noted in the seminal case, "The 1995 amendments [which permit Lloyd's to take the proceeds of suits against agents] do not impose any new liability on Names. They do not require Names to pay more than they were already obliged to pay. They simply provide for additional security for pre-existing obligations." *Soc'y of Lloyd's v. Robinson,* 1 W.L.R. 756, 767 (House of Lords, 1999).

Thus, Tropp had available to him the same panoply of remedies as the previous Names in *Roby* and *Stamm*. The fact that he unsuccessfully exhausted his remedies does not mean that no remedies existed

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[88] *See* Demery Decl. ¶ 35. Also, at oral argument, counsel for Lloyd's described what happened to proceeds of suits against Member's Agents and Managing Agents; "What would have happened, and what happened in a number of cases where Lloyd's Names did sue their agents was that the recoveries or settlements would be placed into a premiums trust fund which held all their reserves for all their underwriting. Because the recovery was related to underwriting, it became an underwriting asset and therefore would effectively reduce the amount that he still owed ... [If] there was an excess, he would have gotten that money," Oral Arg. Tr. Dec. 7, 2007, 27:25-20:24.

[89] *See, e,g., Roby* 996 F.2d at 1365 ("[Title contractual obligations imposing certain fiduciary and similar duties on Members' and Managing Agents .. [lead us to] believe that the available remedies and potential damages recoveries suffice to deter deception of American investors.").

in the first place. We must bear in mind that the presence of procedural and/or substantive law in England that is less favorable to Tropp than laws in the United States does not by itself render the Choice Clause that he signed unreasonable. *See Roby,* 996 F.2d at 1363 ("It is not enough that the foreign Law or procedure merely be different or less favorable than that of the United States.").

Accordingly, as Tropp has failed to persuade us that any of the four *Bremen* factors render the Choice Clause unenforceable, we hold that Tropp is prohibited by the Choice Clause from seeking remedies against Lloyd's in this forum.

III. Enforcement of the Judgment Under New York's Recognition Act

In the alternative, or because in any event Lloyd's would be required to bring a separate suit in this jurisdiction to enforce its judgment against Tropp, we hold that Tropp's complaint fails to state a claim on which relief may be granted. Tropp's legal claims as to the enforceability of the English judgment are no different from those of Names in previous cases, wherein New York courts have enforced similar judgments. *See Soc'y of Lloyd's v. Edelman,* 2005 WL 639412 (S.D.N.Y. Mar.21, 2005); *Soc'y of Lloyd's v. Grace,* 278 A.D.2d 169, 718 N.Y.S.2d 327 (1st Dep't 2000).

The question of whether a foreign judgment is enforceable in this jurisdiction is a matter of state law. *See* Fed. R. Civ. p. 69(a)(1) ("The procedure on execution [of a money judgment] ... must accord with the procedure of the state where the court is

located.") Accordingly, we turn to New York's enactment of the Unitom Foreign Country Money-Judgments Recognition Act (the "Recognition Act"). N.Y. C.P.L.R. §§ 5302-09.[90]

The Recognition Act provides, in relevant part, that foreign country judgments that are "final, conclusive and enforceable where rendered" are enforceable in New York. N.Y. C.P.L.R. §§ 5303; *see CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221, 762 N.Y.S.2d 5, 792 N.E.2d 155 (2003). The general rule of enforceability is subject to two exceptions, first if the judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," N.Y. C.P.L.R. § 5304(a)(1), or second if "the foreign court did not have personal jurisdiction over the defendant." N.Y. C.P.L.R. § 5304(a)(2).

In addition to these exceptions, the Recognition Act also provides courts with limited discretion to refuse to recognize a foreign country judgment if, *inter alia*, "the judgment was obtained by fraud" or "the cause of action on which the judgment is based is repugnant to the public policy of [New York]." N.Y. C.P.L.R. § 5304(b)(3)-(4).

Both this Court, in *Edelman*, 2005 WL 639412, and the Appellate Division, in *Grace*, 278 A.D.2d 169, 718 N.Y.S.2d 327, have held that Lloyd's judgments against American Names arising from

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[90] The parties are in agreement that the Recognition Act is controlling. Tropp Memorandum of Law at 3; Lloyd's Memorandum of Law at 11.

Names' refusal to pay their outstanding underwriting losses and Equitas Additional Premium are enforceable under the New York. Recognition Act. Additionally, many sister courts have similarly held,[91] either under versions of the Recognition Act (which are substantially similar to New York's),[92] or under general common law principles.

Here, Tropp urges that the English judgment is unenforceable because (1) the English system denies Names due process; (2) the discretionary factors counsel against recognition; or (3) if the Recognition Act does not bar enforcement of the English judgment, then the Recognition Act is unconstitutional as applied. We consider each of these arguments in turn.

A. The English System Provides Due Process

Tropp's first argument as to why the English judgment should not be enforced under the Recognition Act is that the English system does not provide procedures compatible with due process of law. Tropp points to his litigation record, and the fact that at first he was only permitted to present his defenses against Lloyd's in a separate action, which he did, with the result that he was defeated by

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[91] For a partial list, see note 3, *supra*.

[92] *See, e.g., Turner*, 303 F.3d 325; *Ashenden*, 233 F.3d 473. We note that New York's enactment of the Recognition Act was specifically intended to be read in the same way as other states' enactments. *See* N Y C.P.L.R. § 5308 ("This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact these provisions.").

Lloyd's immunity. He believes that this litigation history, along with his allegation that Lloyd's would hold and co-mingle any proceeds of suits he brought against his Member's Agent or Managing Agent, shows that the procedures in Names' cases are not compatible with due process.[93]

This argument is not sustainable. As many courts have already discussed, the proper inquiry under the Recognition Act is whether the judgment in question was obtained from a *system* that affords due process of law, not whether a particular case was correctly decided. *See, e.g., Ashenden,* 233 F.3d at 47G ("We have italicized the word ["system"] that defeats the defendants' arguments.... The statute, with its reference to "system," does not support ... a retail approach.") The reason for the "system"-level analysis, or "wholesale approach," as Judge Posner noted in enforcing a Lloyd's judgment in *Ashenden,* is that analyzing individual judgments would in effect give judgment debtors an appeal on the merits, and would be "inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions." *Ashenden,* 233 F.3d at 477.

Nevertheless, Tropp attempts to re-define the terms of the Recognition Act by arguing that the Names' cases are a special "sub-system" of English

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[93] Tropp Reply Memorandum of Law at 2. As Tropp writes, "the UK courts' failure to make available ... any remedy ... prevented consideration of [Tropp's] evidence, [and] fails to provide minimum due process."

law. Such an argument is unsupported by the plain terms of the statute and by the relevant case-law.[94]

Applying the Recognition Act's "system" approach, we follow *Ashenden, Edelman, Grace,* and all other decisions that have uniformly held that it "borders on the risible" to argue that the English system, from which ours explicitly derives, does not afford due process, *Ashenden,* 233 F.3d at 476.[95] *See also British Midland Airways Ltd. v. International Travel, Inc.,* 497 F.2d 869, 871 (9th Cir.1974) ("United States courts which have inherited major portions of their judicial traditions, and procedure from the United Kingdom are hardly in a position to call the Queen's Bench a kangaroo court."); *Roby,* 996 F.2d at 1363 ("United States courts consistently have found [English courts] to be neutral and just forums"); *Edelman,* 2005 WL 639412 at *3 ("It is incontrovertible that the English judicial system provides impartial tribunals and 'procedures compatible with the requirements of due process of

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[94] Tropp's lone source of authority for contending that Names' cases should be deemed a separate "sub-system" of English law is his citation to a United States Supreme Court case, *Parisi v. Davidson,* 405 U.S. 34, 41, 92 S.Ct. 815, 31 L.Ed.2d 17 (1970), which held that a military serviceman could bring a habeas petition in federal court to obtain discharge from the armed forces, even though the military and civilian courts were distinct "systems" of justice in the United States. The case had nothing to do with the Recognition Act, however. Clearly, the word "system" may have different meanings in different contexts.

[95] As Judge Posner noted in *Ashenden,* whether England has a civilized court system that provides due process is neither a question of fact, nor a question of law, and federal courts in addressing this question may consult any relevant material. 233 F.3d at 477.

law.'" (internal citations omitted); *CIBC,* 100 N.Y.2d at 222, 762 N.Y.S.2d 5, 792 N.E.2d 155 (it "is beyond dispute" that the English judicial system affords litigants due process); *Grace,* 278 A.D.2d at 169, 718 N.Y.S.2d at 328; *Porisini v. Petricca,* 90 A.D.2d 949, 456 N.Y.S.2d 668, 890 (4th Dep't 1982).

Not only does the English system as a whole provide due process, there is no evidence that it denied due process in Tropp's particular case. As discussed above, Tropp's arguments turn on his assertion that there were no available remedies in England. He then leans heavily on dicta from Judge Posner's opinion in *Ashenden,* wherein Judge Posner contemplated that if English law denied the Names any opportunity whatsoever to challenge the Equitas Additional Premium, that would amount to a denial of due process.

If Parliament passed a law that the Equitas premium was whatever Lloyd's Council said it was, this would not be a denial of a procedural right of any of the Names, but rather a revision of the substantive terms of the Names' relation to Lloyd's, But if Parliament went further and precluded the Names from challenging in court the applicability of the new law to them, that would be a curtailment of their procedural rights, and doubtless a deprivation of their property without due process of law.

Ashenden, 233 F.3d at 478. Tropp argues that Judge Posner's latter scenario is precisely what happened to him. However, it is not: at six separate stages in the proceedings (including his motion to dismiss), the English system afforded Tropp an opportunity to be heard, and he submitted extensive

briefings which were meticulously considered by judges. In turn, the judges issued 59 single-spaced pages of opinions (comprising some 178 separately numbered paragraphs). The fact that Tropp did not prevail in any of these hearings does not mean that the English system lacks due process.

Each of the decisions in Tropp's litigation was on the merits. In the first set of proceedings, when Lloyd's sued Tropp to collect, the English court upheld certain expedited collection procedures. Many such procedures are familiar to American law, for instance 28 U.S.C. § 1346 provides that a taxpayer cannot bring suit to dispute a federal tax in federal district court until after he or she has paid the disputed tax. *Flora v. United States,* 362 U.S. 145, 177, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960) ("[Section] 1346(a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court.") *See also Ashenden,* 233 F.3d at 479 (noting that "pay now, sue later" is similar to the federal law system that requires a firm withdrawing from a multi-employer pension plan to pay the plan administrator's assessment first and reserve objections for a subsequent suit, 23 U.S.C. §§ 1399(c)(2) and 1401(d)).

In the second set of proceedings, when Tropp presented his counterclaims, the English courts held that Tropp's evidence was insufficient to state a claim of fraud on the part of Lloyd's. The courts based their decisions on the fact that Tropp was not suing his individual Member's Agent or Managing Agents, but Lloyd's, the regulator of the market, and

that Lloyd's in its regulatory capacity has a well-established statutory immunity that protects it from suits for negligence. Not only are statutory immunities a very familiar concept in American law, especially with respect to bodies charged with certain public law functions,[96] but moreover the presence of statutory immunities has nothing to do with "due process," since, as Judge Posner pointed out in *Ashenden,* due process under the Recognition Act is concerned only with *procedural* due process, not *substantive* due process. 233 F.3d at 480 ("[T]he cases that deal with international due process talk only of procedural rights ... The only substantive basis that the [Recognition Act] recognizes for not enforcing a foreign judgment is that 'the cause of action on which the judgment is based is repugnant to ... public policy'").

Further, we note that even at the time that Judge Posner crafted his *Ashenden* hypothetical on what would constitute a complete denial of due process, he was aware that certain Names had presented their arguments on counterclaims and had not succeeded. In fact, Judge Posner's *Ashenden* decision described the procedure by which Names were required to bring their defenses as counterclaims, cited to *Soc'y of Lloyd's v. Jaffray,* 2000 WL 1629463 (Queen's Bench Division (Comm.Court), Nov. 3, 2000) (Creswell, J.), and noted that "Some have now done so, and lost." *Ashenden,* 233 F.3d at 476. *Jaffray* was a

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[96] *See, e.g.,* U,S. Const. amend. XI (state sovereign immunity); *Kalina v. Fletcher,* 522 U.S. 113 (1997) (prosecutorial immunity); *Pierson v. Ray,* 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (judicial immunity).

consolidated litigation to bring all claims for fraud against Lloyd's in one proceeding. Approximately 200 non-accepting Names (a number of whom were U.S. Names) brought counterclaims against Lloyd's arguing that Lloyd's had made fraudulent misrepresentations to them about, among other things, the efficacy of its regulation. Following 64 days of trial, the Queen's Bench rendered judgment in favor of Lloyd's, largely on the grounds that there was not enough evidence of actual fraud on the part of Lloyd's.

Tropp argues that *Jaffray* is inapposite on a number of fronts, namely, that he did not join that litigation, that the *Jaffray* Names asserted claims of fraud from the 1980s only whereas Tropp's claims of fraud arose from 1995-96, and that in Tropp's case the court construed Lloyd's Immunity in a new and unprecedented way.[97] But none of these arguments alter the basic fact that the English courts found Tropp's evidence of fraud on the part of Lloyd's to be unavailing. Nor does it change the ability of Tropp to pursue actions against his Member's Agent or his Managing Agent, as previously discussed.

In sum, nothing within the constellation of claims presented in Tropp's complaint, even if true,

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[97] Tropp also asserts a number of other, less significant differences between his counterclaims and the *Jaffray* litigation, such as the fact that the *Jaffray* Names claimed that Lloyd's failures arose from omission, whereas Tropp asserted positive wrongful acts; and the *Jaffray* Names sought recission of their contracts with Lloyd's whereas Tropp only sought enforcement and an accounting.

could lead to the conclusion that the English system lacks procedures compatible with due process of law.

B. The Recognition Act's Discretionary Factors

Tropp next argues that several of the discretionary factors related to the Recognition Act counsel against any potential enforcement. It is clear that these are not relevant.

First, Tropp claims that the judgment against him was "obtained by fraud," as set forth in C.P.L.R. § 5304(b)(3). Even assuming, arguendo, that Tropp's complaint states a claim that Lloyd's perpetrated a fraud on him, such a claim is patently insufficient under the terms of the statute. As this Court noted in *Edelman,* 2005 WL 639412 at *5, "The proper inquiry [under the Recognition Act] is not whether the underlying relationship that gives rise to the plaintiff's claims is tinged with fraud, but whether the foreign judgment itself 'was obtained by fraud.'" (*citing Ackermann v. Levine,* 788 F.2d 830, 341 (2d Cir.1986); *Koehler v. Bank of Bermuda Ltd.,* No. M18-302 (CSH), 2004 WL 444101, at *15-16 (S.D.N.Y. Mar.10, 2004); *Fairchild, Arabatzis & Smithy Inc. v. Prometgo (Produce & Metals) Co.,* 470 F.Supp. 610, 615 (S.D.N.Y.1979)). Quite simply, Tropp has not stated a non-frivolous claim that Lloyd's worked any kind of fraud on the English courts.

The second discretionary factor Tropp invokes is that the cause of action sued on violates the public

policy of the state of New York.[98] C.P.L.R. § 5304(b)(4). But, as both *Grace* and *Edelman* have pointed out, the cause of action underlying Lloyd's judgments against the Names is simple breach of contract,[99] and causes of action for breach of contract do not violate the public policy of N ew York. *See Grace,* 718 N.Y.S.2d at 328 (English judgments against Names "do not violate any public policy of New York or the United States"); *Edelman,* 2005 639412 at *5-6 (holding under New York law that "the English judgments are enforceable and consistent with public policy.") Similarly, numerous other courts have held that Lloyd's judgments do not violate the public policies of respective states. *See Turner,* 303 F.3d at 333 (holding that Lloyd's action to collect the Equitas Premium is not contrary to Texas public policy); *Ashenden,* 233 F.3d at 478-70 (Illinois public policy); *Mullin,* 255 F.Supp.2d at 474-78 (Pennsylvania public policy); *Siemen-Netto,* 457 F.3d at 99-100 (District of Columbia public policy); *Reinhart,* 402 F.3d at 995 (New Mexico public policy).

Tropp is correct that the cause of action in Lloyd's case against him was not a run of the mill, or "plain vanilla" contract claim.[100] As discussed above, Lloyd's appointed a substitute agent, AUA9, who signed the Equitas contract on behalf of all Names.

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[98] Tropp Memorandum of Law, at 18-19.

[99] Tropp admits that the cause of action sued on was breach of contract, but argues that the contract was imposed on him unilaterally almost nine years after he signed the General Undertaking, and that Byelaws of Lloyds have the force of statute in England. Tropp Memorandum of Law, at 18-20.

[100] Tropp Memorandum of Law, at 18-20.

This was done pursuant to a Byelaw that had been in existence at the time that Tropp joined Lloyd's and agreed to be bound by all Lloyd's current or future Byelaws.[101] Regardless of whether such a scheme would be acceptable under New York contract law, we cannot say that the English courts' decision to bind the Names under these circumstances is repugnant to the public policy of New York. *See Siemen-Netto,* 457 F.3d at 94 ("It was no doubt risky for the [Names] to agree to be bound by future Byelaws in this way. But the General Undertaking was no contract of adhesion"); *Reinhart,* 402 F.3d at 996-97 (noting that the Names were "highly sophisticated investor[s] who had to pass a 'means' test.").

Thus, none of the discretionary factors in C.P.L.R. § 5304(b) render the English judgment against Tropp unenforceable under the Recognition Act.

C. The Recognition Act is Not Unconstitutional as Applied

Tropp's last argument-that if the Recognition Act does not bar enforcement of the English judgment, then the Recognition Act as applied to his case is unconstitutional under the Due Process Clause of the Fifth Amendment-is also meritless.

Tropp cites *Bachchan v. India Abroad Publications Inc.,* 154 Misc.2d 228, 585 N.Y.S.2d 661

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[101] Tropp's duly executed General Undertaking contained a clause that specified that he would be bound by any future Byelaws promulgated by the Lloyd's Council. *See* Tropp Decl. Ex. B [General Undertaking] at ¶ 1.

(Sup.Ct.1992) for the proposition that an English court's reversal of the burden of proof in a way that runs afoul of a constitutional protection may render a foreign judgment unenforceable under the United States Constitution.[102] In *Bachchan,* a New York court refused to recognize an English libel award because English libel law places the burden of proof on the media to prove the truth of their statements. But the decision in Bachchan was based on significant, substantive differences between English and New York libel law. As many courts in Lloyd's cases have already noted, the substantive differences between English and United States contract law, by contrast, are minimal, and do not carry nearly the same public policy implications as the differences between American and English libel law. *See, e.g., Stemon-Netto,* 457 F.3d 94, 101-02 (D.C.Cir.2005) (rejecting the argument that American courts' refusal to recognize English libel law judgments is persuasive authority in Lloyd's cases, where judgments were based on breach of contract). Accordingly, we reject the argument that the Recognition Act as applied to Tropp is unconstitutional.

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[102] *See* Tropp's Memorandum of Law at 22-23. Tropp also attempts to argue that the Equitas Contract was a contract of adhesion because it was signed on his behalf by a substitute agent and therefore is not enforceable here under *D.H. Overmyer v. Frick Co.,* 405 U.S. 114, 180 (1972) and *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). *See* Tropp Memorandum of Law at 22-23 & n. 6. Yet, Lloyd's is not seeking to enforce that contract here, but rather an English judgment. The standard for doing so does not require that we find the Equitas Contract itself to he binding under domestic contract law.

CONCLUSION

Tropp's travails with Lloyd's have been epic, and have resulted in enormous losses that Tropp never could have foreseen when he joined Lloyd's in 1967, Nevertheless, Tropp's current legal claims against Lloyd's are not sustainable. Tropp signed a contract wherein he agreed to be bound by all of Lloyd's past, present, or future Byelaws, and he further agreed to pursue claims against Lloyd's only in England. When he pursued them there, he lost, but only after presenting his arguments in five different fora.

Thus, Tropp's motion for partial summary judgment is denied, and Lloyd's motion to dismiss is granted pursuant to Fed.R.Civ.P. 12(b)(3) for improper venue, or, in the alternative, pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim. Tropp's complaint is dismissed in its entirety, and the Clerk of the Court is directed to close this case.

SO ORDERED.

APPENDIX C

A3/2005/1100

Neutral Citation Number: [2006] EWCA Civ 88
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMMERCIAL COURT
QUEEN'S BENCH DIVISION
MRS JUSTICE GLOSTER

Royal Courts of Justice
Strand
London, WC2

Monday, 23 January 2006

B E F O R E:

LORD JUSTICE BROOKE

LORD JUSTICE RIX

THE SOCIETY OF LLOYDS
Claimant / Respondent

- v -

TROPP

Defendant / Appellant

DAR Transcript of Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

THE APPELLANT APPEARED IN PERSON
THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED

JUDGMENT
(As Approved by the Court)

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1. LORD JUSTICE RIX: This is the application for permission to appeal of Mr Richard Tropp, a litigant in person. I am indebted to Mr Tropp for his careful submissions, which can be found in his lengthy grounds and skeleton arguments. His written submissions, and today his oral submissions, speak volumes for his hard work and research in an area of law which I think is not even that of his own nationality, for I think he comes from America, and he has worked extremely hard to present his case to this court, and no doubt to the court below, as clearly as he can.

2. His application arises out of claim brought by the Society of Lloyd's as assignee of Equitas' claim under the Reinsurance and Renewal contract of 1996 (R and R), for the Equitas premium applicable to Mr Tropp as a Name at Lloyd's. Mr Tropp is one of that minority of Names at Lloyd's who did not sign up to R and R, but who have, nevertheless, found themselves in the uncomfortable position of having to meet claims for the Equitas premium which,

under the R and R contract was imposed upon them, pursuant to their obligations at Lloyd's, despite the fact that they were not specifically consenting to the R and R contract. On 24 May 2004 Gross J heard the Society's Equitas premium claim against him in summary form, and granted summary judgment. That judgment was obtained, as happened not infrequently in these courts over the last few years, with the help of clauses in the R and R contract which contain conclusive evidence and no set-off provisions. In those circumstances, Mr Tropp's ability to resist that claim was limited, judgment was given against him, he sought permission to appeal against that judgment from this court but failed before a court presided over by Waller LJ on 2 November 2004.

3. There remains, however, Mr Tropp's counterclaim in the proceedings brought against him by the Society, which of course was not touched by the no set-off provisions of R and R. That counterclaim was considered by Gloster J in her judgment of 5 November 2004, which is the judgment from which this application for permission to appeal arises. In her judgment she gives her reasons for summarily dismissing Mr Tropp's counterclaim on the strike-out basis that his litigation was highly speculative and did not disclose any reasonable prospect of success. As part of that strike-out, she refused to give permission to Mr Tropp to amend his counterclaim to join to it numerous - indeed very numerous - other parties apart from the Society, in the form of Mr Tropp's managing agents, or members' agents, or controlling

principals of those agencies or, in other cases, individual persons.

4. I should also mention that applications by Mr Tropp for further information or disclosure from the Society which he made pursuant to Part 18 or Part 31 of the CPR were rejected either as part and parcel of Mr Tropp's failure on the Equitas premium claim before Gross J, or to the extent that Gross J left over for consideration, as part of the counterclaim proceedings, certain of those requests for further information or disclosure, failed before Gloster J as part of her strike-out judgment.

5. What, then, is Mr Tropp's counterclaim? It has been developed and elaborated in his written and oral submissions, but the essence of it has to be found in the particulars of his statement of case, and I therefore take the essence of the counterclaim from his document headed "Defence and Counterclaim" at section 7 of the appeal bundle before us, in particular at paragraph 38, which I will read:

> "The defendant avers to the Court, in contemplation of the relief he will seek in the counterclaims to follow, that there has been a systemic institutional performance failure by Lloyd's -- a failure to supervise, in its market promotion capacity, and to regulate, under its statutory delegation of authority -- in turning its head to and consciously avoiding, rather than seriously reviewing and providing relief for, wrongful behaviour by particular agencies which victimised Tropp and others on his particular syndicates. This is compounded by Lloyds'

claim now seeking more fruit of the arguably poisonous tree.

"At trial, in evidence documenting years of rebuffs by various Lloyd's offices as he sought internal relief, Tropp will shown an endemic and continuing failure of corporate ethics and governance, a pattern of nonfeasance and deliberate avoidance by Lloyd's and its officers, of its supervisory and regulatory institutional responsibility.

"It is because of such pervasive failure in governance, and arguably of moral courage, that Tropp prays the Court for remedies now sought."

6. Mr Tropp then in his counterclaim, under the heading "Remedies Sought in Counterclaim" set out declarations or specific performance that his counterclaim sought. First, he sought a declaration that his counterclaim did not fall within the immunities to liability provided by section 14 of the Lloyd's Act 1982; he also sought specific performance by Lloyd's of its obligations under the Lloyd's Act 1982, concluding but not limited in particular to what are described as recalculations of his losses and liabilities, a refund to him of monies revealed by the recalculation, and a claw-back or unwinding of R and R, if not earlier reinsurances to close (RITCs) in his syndicates; and with reference to the further parties whom he sought to join by amendment to his counterclaim, a declaration for what he describes as "a disgorgement" of his pro rata share of the fees and expenses taken in error out of the syndicate's

reserves by managing and members agents and their like.

7. So that is the essence of the counterclaim made, both against the Society and against third parties yet to be joined to that counterclaim. So far as the Society is concerned, the counterclaim sets up a systemic failure to exercise its supervisory regulatory institutional responsibilities and, pursuant to that, seeks monies by way of recalculations and claw-backs and unwindings of RITC premiums, the effect of which has been debited to Mr Tropp and his fellow Names; and against the third parties yet to be joined, he seeks fees and expenses involved in the RITC process. I am trying, very swiftly, to expound and gloss Mr Tropp's pleadings, but that is the essence of what I find in his counterclaim.

8. One of the questions which arose before Gloster J was whether that counterclaim raised a case in fraud against the Society. Fraud is not addressed expressly and specifically in the counterclaim to which I have referred, but nevertheless the judge was prepared to assume, with the assistance of Mr Tropp's skeleton arguments and oral submissions, that his reference to the Society turning its head and consciously avoiding - or deliberately avoiding - its supervisory and regulatory responsibilities amounted to a dishonest, or reckless, disavowing of its responsibilities, what has been described at times as the dishonesty involved in "shut-eye knowledge" - a reference of course to Admiral Nelson's famous putting of a telescope to blind eye.

9. That, as I say, is the essence of the counterclaim, involving as the judge was prepared to accept, at any rate for the sake of argument, a claim in fraud. Nevertheless, in elaborating his submissions in writing and orally, Mr Tropp has also spoken about fault on the part of the Society, or perhaps others as well, and remedies to which that fault gives rise, he submits, arising out of the general law of insurance, as found either in the Marine Insurance Act 1906, and in particular section 17 with its reference to the duty of utmost good faith, or elsewhere in that Act, or in the common law of insurance as that has been developed in the courts' jurisprudence.

10. Nevertheless, despite erudite references to English insurance law, statutory or common law, what is not easy to discern from Mr Tropp's submissions are the particular causes of action upon which he relies for the purposes of his counterclaim, other than I have sought to express them by reference to the counterclaim itself expanded by the incorporation of a case in fraud. Thus, although the counterclaim refers to breaches of supervisory duty there is no express reliance upon express terms of contract, or indeed implied terms of contract, between Mr Tropp and the Society. Of course, as a Name, Mr Tropp was entering into a range of contracts - not with the Society, but with members' agencies and managing agencies - and of course as a Name he was entering into all kinds of insurance contracts, underwriting contracts and reinsurance contracts as one Name on a body of Names known as a syndicate.

11. Indeed, for these purposes, Mr Tropp has referred us to the comparatively recent case of Sphere Drake Insurance v Euro International Underwriting [2003] Lloyd's Rep IR 525 in which Thomas J found a case of dishonesty proved by the claimants in that case, Sphere Drake Insurance Ltd, against a combination of agencies and individuals. Mr Tropp relies upon Thomas J's analysis in that case of what really amounted to a dishonest conspiracy by the defendants involved to reinsure dishonestly, to insure or reinsure apparent risks which were, in truth, going to lead to inevitable losses as a result of underwriting done in past years, and to do that without proper disclosure to the insurers or reinsurers. It may be, I do not know, I say nothing on the subject, that similar claims if made by Mr Tropp against agents with whom he dealt and underwriters who were effectively in charge of the business of the syndicates upon which he was a Name, might lead to similar claims being aired with possibly similar success. I know not, but Sphere Drake was a case which was brought against agents and individuals and not against the Society. I do not understand how that analysis can be brought home against the Society by reason of any doctrine of the Marine Insurance Act or of insurance law other than through the analysis which I find in Mr Tropp's counterclaim that is an analysis of the breach of the Society's regulatory and supervisory functions.

12. The difficulty about that, however, is of course that section 14(3) of the 1982 Act provides an express immunity for the Society from liability in damages otherwise than for fraud. The section can be found set out in an annex to the judgment of this

court in Jaffray v Society of Lloyd's (unreported, 26 July 2002), where this court considered at considerable length the claim by various Names under the lead of Mr Jaffray, who has given his name to the case, in fraud against the Society, but rejected their claim. Those claims were rejected not because of any immunity contained within section 14(3) — expressly, fraud lay outside such immunities - and not because the Names in that case were not able to go so far as to point to representations which were found to amount to misrepresentations, but because their case in fraudulent misrepresentation otherwise failed on the merits, on the basis that dishonesty was not proved..

13. It is well known that, in order to ensure that a case in fraud against the Society could be considered over as wide a base as possible, notice was given through the Commercial Court that all Names, apart from Mr Jaffray, who wished to bring a claim in fraud should join themselves to those proceedings, as they were permitted to do. Their various ways of putting a case in fraud were considered, but all failed, not, as I say, on the basis of not having a representation upon which to rely, but upon the basis of no dishonesty.

14. How then, in this case, does Mr Tropp seek to avoid the immunity in respect of all breaches of duty sounding in damages other than in fraud, or the jurisprudence of these courts, the Commercial Court and this court, in recent years which has made the path of a Name seeking to claim against the Society a stony path? Perhaps I should just briefly mention the leading cases in recent years which I,

and indeed Mr Tropp, have in mind in this connection. In the Society of Lloyd's v Clementson [1995] CLC 117 this court dealt with a submission as to the nature of the effect of section 14(3). At page 122 Sir Thomas Bingham MR said this:

> "The clear and simple purpose of this agreement [he was referring to the underlying agreement and undertakings that a Name entered into with the Society of Lloyd's upon becoming a Name, and in order to become a Name] was to ensure that on his becoming a Name, Mr Mason became subject to the regulatory regime of Lloyd's. The clauses governing choice of law and venue were ancillary to that object. No contractual obligation was needed to restrain Lloyd's from acting unlawfully, *ultra vires* or in bad faith, because it had no power to do so and could be restrained from doing so without the need to rely on any contract. It was in no way necessary to the efficacy of the contract that Lloyd's should regulate and direct the business in its market with reasonable care, and bearing in mind the terms of section 14 of the Lloyd's Act 1982, it is plain that such a term would not have been unquestionably accepted. Mr Mason was subjecting himself to the regulatory jurisdiction of the body of which he was becoming a member and consisting of his fellow members. For the management of his underwriting business he would look to his own agents and not to Lloyd's. In contractual terms there was no more to it than that."

15. That was a leading case going back to 1995, in which it was emphasised that the Society was conducting a regulatory activity and that it owed to the Names no contractual obligations outside that regulatory activity and no terms needed to be implied, not even a term concerned with an obligation not to act in bad faith, because none was needed. Thirdly, this court recognised that, were the Society in its regulatory functions acting unlawfully, or in excess of its powers (*ultra vires*) or in bad faith, it could be restrained from doing so.

16. The next case I would mention is the Society of Lloyd's v Leighs [1997] CLC 1398. In that case, Lloyd's regulatory activity in approving the R and R contract, and thus in ensuring that the R and R contract was binding on all Names who had given undertakings to the Society of Lloyd's, and not only those Names who expressly accepted the offer made to them under the R and R contract, was acting *intra vires*. I refer to page 1402h-1403c and would merely cite within this judgment the short paragraph at 1403b, thus:

> "R and R, and in particular the Equitas scheme is not, of course, simply designed to provide cover against the risk of individual defaults. It has a much more fundamental object - to settle intractable litigation and to avoid the need to put the whole of Lloyd's into run-off. In short, a primary object of the scheme, if not the primary object, has been to save Lloyd's itself, for the benefit of its members. We find it hard to see how it can be argued that the scheme has not been:

'requisite or expedient to the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society.'"

17. That case also held that, for separate reasons, it was not open to rescind the obligations entered into by the Names, pursuant to their Lloyd's underwriting or to the R and R contract.

18. Next I would refer to the Society of Lloyd's v Fraser [1998] CLC 1630, also in this court, which again upheld the R and R scheme, and held that an argument of bad faith was no defence to a claim for the Equitas premium, but would have to be progressed by way of a separate counterclaim. In Price v Society of Lloyd's [2000] Lloyd's Reports-IR 453 Colman J considered and summarily rejected a claim against the Society in fraud. He said at 460:

"In order to make good a claim for damages for breach of contractual, common law or statutory duty, it is in any event necessary to establish that Lloyd's acted in 'bad faith' under section 14(3) of the Lloyd's Act 1982. That means that the conduct relied upon as the breach of duty must be tainted by fraud or in some material respect dishonest. Mere negligence is not enough, nor is administrative incompetence. If, in the absence of section 14(3) there would be no underlying enforceable duty to act, it is impossible to see how mere inactivity on the part of Lloyd's can be relevantly fraudulent

or dishonest so as to provide a means of avoiding the effect of section 14(3).

"Having considered the evidence produced by Mr and Mrs Price as to the gross incompetence with which their syndicates were administered by RTY and by the underwriter, Mr Bullen, particularly with regard to the lack of errors and omissions cover, in 1990 and 1991 and as to what Lloyd's knew about this incompetence from the General Review Department report, from the Coopers and Lybrand Loss Review and from what emerged in the Berriman v Rose Thompson Young Underwriting Ltd [1996] LR LR 426 before Morison J, I am entirely unpersuaded that there is any *prima facie* case which could be made against Lloyd's that its inactivity was primarily or partially motivated by the personal interests of those taking the decisions and that therefore it acted fraudulently or dishonestly, let alone in breach of any relevant duty. For these reasons, this ground of claim has no real prospect of success."

19. That decision was more or less contemporaneous with Cresswell J's decision after trial to similar effect in the Jaffray case. I have already referred to the Court of Appeal's rejection of the case in fraud on appeal in Jaffray.

20. I need mention two more cases. One is Laws v Society of Lloyd's [2003] EWCA Civ. 1887 (unreported, 19 December 2003). That was the case in which an attempt was made to bring home

against the Society claims by reason of the undermining of the section 14(3) immunity through reliance on the Human Rights Act 1998, which had by then come into operation on 2 October 2000. In his judgment Waller LJ rejected the reliance upon the Human Rights Act for at least two separate reasons. One is that the Act was not retrospective before 2 October 2000 - that reasoning is applicable to Mr Tropp's case as well - and secondly, Waller LJ and this court held that because section 14 was not a mere procedural bar but conferred a substantive immunity, for that reason it did not engage any remedy through article 6 of the ECHR. Moreover, in that case this court considered yet again whether a case could be made in fraud and it held that, in the absence of a fraudulent misrepresentation, a case in bad faith could not be merely premised upon a breach of a duty to advise Names because it had already been held in Clementson, but also in Ashmore v Corporation of Lloyd's (No. 2) [1992] 2 Lloyd's Rep 620 and in Price v Society of Lloyd's that no such duty to advise existed. Finally, again in this court, in R on the application of West v Lloyd's of London [2004] EWCA 506, [2004] 3 Au ER 251 this court had to consider, for the purposes of a claim brought in judicial review, whether there was any remedy in judicial review or under the Human Rights Act, and this court held that because the Society of Lloyd's was not a public authority for the purposes of the Human Rights Act, and because its objectives were commercial rather than public, there was neither judicial review of its functions nor was there available any relief under the HRA.

21. That is the jurisprudence which Mr Tropp had to overcome. How did he seek to do so? His essential new point is that a consideration of the travaux préparatoires in Parliament, whether in committee or otherwise, showed two things. First, that the section 14 immunity was designed to protect Lloyd's only in its regulatory functions and not otherwise, and secondly that the immunity was an immunity against a claim for damages and not against other remedies such as in judicial review or for declarations, injunctions, specific performance or the like.

22. Following redoubtable research, Mr Tropp is able to make a persuasive case that section 14(3) ought to be construed in that way. I will assume, for the purposes of this application, that this is so. The question is, nevertheless, whether Mr Tropp's counterclaim is a counterclaim brought against Lloyd's for other than breach of its regulatory function. It seems to me that, on the plain wording of Mr Tropp's counterclaim which I began this judgment by referring to and reading from, that that is not so. In truth, Mr Tropp has, I fear, been misled into a false submission, as I would describe it. He has assumed that because, for the purposes of asking the question whether judicial review relief or Human Rights Act relief is available against the Society, and the answer that it is not because it is not a public body performing public regulatory functions, therefore it follows that the Society did not perform regulatory functions at all. In that he is, I fear, in error. It is quite clear, as Mr Tropp's counterclaim itself has as its fundamental premise, that the Society was for relevant purposes fulfilling, or

seeking to fulfil, regulatory functions. But its regulatory functions under the 1982 Act were private regulatory functions, or what has been described as "self regulation",- that is to say self regulation by a private and not a public law body. So it simply does not follow from the fact that the Society is not a public body, is not amenable to judicial review, is not amenable to the Human Rights Act, that it was not performing regulatory functions - it seems to me it was, it seems to me that Mr Tropp's counterclaim is fundamentally premised upon the fact that it was.

23. Pursuant to the same submission, Mr Tropp seeks to argue that the remedies which he seeks in his counterclaim are not in damages but other remedies such as a declaration, or an unwinding, or a disgorgement, or recalculation, or such matters to which I have referred in dealing with his counterclaim. It seems to me, however, that these expressions are in truth nothing else but an attempt to avoid putting his claim in damages for supervisory failures that is the essence of the counterclaim. Indeed, in a number of passages in his written submissions, or today in oral argument, Mr Tropp has emphasised what he is not seeking to do: he does not seek to rely upon a duty to advise, he does not seek to rely, he says, upon any misrepresentation, he does not seek to rely upon a claim in damages. What is he then seeking to do? How does he put his claim? There is, as this court indicated as long ago as Clementson, no claim in contract against the Society, there can only be a claim in fraud based upon dishonesty and if Mr Tropp seeks, as the judge assumed he was seeking, to put a claim in fraud, the

remedy is in damages - there may also, of course, be a remedy in fraud for rescission, but Mr Tropp says that he is not seeking rescission. It seems to me, nevertheless, that in one way or another Mr Tropp is seeking to make good a financial remedy which can only be a remedy either through rescission or through damages premised on a claim based on a dishonest failure of regulatory supervision.

24. Although Mr Tropp seeks to submit that he is making a claim which somehow invokes general principles of insurance law, nevertheless he has no insurance contract with the Society which would enable him to invoke those remedies of insurance law. Such remedies have to be pursued, as they were in Sphere Drake, against other bodies.

25. Next, Mr Tropp submits that section 14(3) does not exclude causes of action arising from the common law of set off. There are, in fact, no causes of action arising from the law of set off. The law of set off provides a defence to a claim and may do so either through a pure defence, or through the setting off of a cross-claim, or counterclaim, but one still has to have either defence or cross-claim. I am concerned with Mr Tropp's submission that he has a cross-claim or counterclaim, and that is what I am seeking to investigate, to see whether he has one, but the law of set off provides him with no separate assistance in this regard.

26. Next, Mr Tropp submits that section 14(3) does not exclude any remedies given by reason of the English law of assignment. He submits that he can pursue counterclaims against the Society that he could have pursued against Equitas as assignors.

Again, I regret to say that Mr Tropp is in error here. The law of assignment may provide a defence to someone who is sued by an assignee to the extent that he would have had a defence against the assignor - that is to apply to the assignee the equity of the defences available against the assignor - but none of this law of assignment puts upon its feet a cross-claim or counterclaim which otherwise does not exist.

27. Next, Mr Tropp submits, although he has not emphasised these matters in his oral submissions today, that the judge acted prematurely in refusing his requests for further information and disclosure. He submits that following the doctrine laid down by the House of Lords in the Three Rivers case, and indeed the point is also made in other cases, that one should be cautious about striking out a claim on the basis of what has been described as a "mini-trial", and that one should be cautious to remind oneself before striking out a claim that disclosure and the other procedures of a trial or pre-trial procedures may show that a case is in truth one that can stand on its feet, as one deserving of trial, even though that might not be clear at an early stage before procedures for further information and disclosure have worked their way through. The position is, however, that the only requests for information or disclosure which were struck out by Gross J were those relevant solely to the Equitas premium claim itself. He specifically reserved in his order those applications for information or disclosure which he considered might be relevant to the cross-claim which was not before him. It was therefore only after Gloster J, who considered the strike-out application

on the cross-claim, had concluded that that claim showed no reasonable prospect of success which ought to go to trial, that the further requests for information and disclosure fell together with that strike-out.

28. In my judgment Gloster J was perfectly entitled to take that view: the question was whether in law or on the pleading or material put before her there was any reasonable prospect of success. It seems to me that the judge was entitled to take the view that there was not. She was bound by section 14(3) and the jurisprudence to which I have referred. To the extent that she was prepared to assume in Mr Tropp's favour that he sought to make a claim in fraud or dishonesty based upon shut-eye knowledge in the course of the Society's regulatory function, she was entitled to conclude, against the background of the jurisprudence to which I have referred and in particular cases such as Price, Clementson and Laws which have considered allegations of fraud in this context before, that this claim, to the extent that it relied on fraud was entirely speculative and also showed no reasonable prospect of success.

29. Next, as Mr Tropp submitted in writing, rather than strike out his claim the judge ought to have acceded to allow him permission to amend his counterclaim, in order the better to plead it, particularly in relation to fraud. He says that he thought that a bare allegation would suffice and that proof was a matter for trial and not for pleading. In particular in relation to fraud, however, he is mistaken. This court may well strike out a claim in fraud which is put as a bare allegation, which is not

sufficiently supported by pleaded particulars to indicate that there is reasonable prospect of a valid case to go for trial. The judge stated that she had carefully read all the material which Mr Tropp sought to put before her as supporting a case in fraud. Mr Tropp has not sought to ask this court to undertake a new exercise in that regard. In my judgment, his application on this ground fails as well.

30. Finally, Mr Tropp submits that the judge erred in refusing to grant him permission to amend his counterclaim to join the other parties, of whom I have made mention towards the beginning of this judgment. In my judgment, however, the judge was perfectly entitled in her discretion to do that. In truth, the claim against agents, controlling companies and individuals did not, as Mr Tropp submits, arise out of the same facts, or substantially the same facts, as he had already pleaded. His claim against the Society was based upon their regulatory failure. His claim against the agents and so forth was based upon the fact that they, to put it colloquially, had their fingers in the till. In any event, the point here is as to whether Mr Tropp can bring those claims against those other parties into this litigation for whatever Limitation Act help that that would give him, or whether he should be left to some other piece of litigation, such as he may be able to bring against those parties. In my judgment, in her discretion the judge was perfectly entitled to and was in principle right not to give him permission to amend to bring those parties into litigation against Lloyd's, which as a claim against Lloyd's had no prospect of success.

31. This afternoon, in his oral submissions, Mr Tropp put before all else certain matters as showing the justice of his case and the injustice of upholding the judge's strike-out. He gave two examples. First - and it is a matter of assertion, but I will assume that his assertions are correct, for the present purposes for the sake of the argument - he says that under the R and R contract and the assignment over by Equitas to Lloyd's for the purposes of collecting the Equitas premiums, Equitas received from Lloyd's a sum of something under $300 million, but received from Equitas in return something only a little under $4 billion. He asks what has happened to the difference? He submits that it has completely disappeared and that that money does not belong to Lloyd's but to the Equitas Names, and indeed to him *pro rata* for his share. This seems to me, however, to raise entirely new claims, not within his counterclaim, not considered by the judge below. Although he says that information or disclosure sought under his requests might assist him in this regard, it seems to me that such a claim does not arise out of Lloyd's regulatory function, but is in effect alleging that there is a great deal of money - something between 3 and 4 billion dollars, in fact - belonging to the Names and to Mr Tropp for his share as one amongst Names, which is their money and which is either lost somewhere in the coffers of Lloyd's, or else has been wrongly dealt with and has been misappropriated by Lloyd's. It seems to me that such a claim, if there is any factual basis to it at all, must be a claim in conversion or for breach of trust or some such equitable claim and is not to be found in his counterclaim.

32. The second example which he said would be revealed from answers to his request for further information and disclosure arose out of his personal position. He says that in late 1996 it came to his attention that his managing agents had paid into an account in his name at a bank in London a great deal of money, indeed more than the premium for which the Society has successfully sued him in these proceedings, that he allowed that money to lie where it was and, at the end of the day, following R and R that money had disappeared, that he had evidence that it had not reached Equitas and that he is seeking its return. There again, it seems to me that that is a claim which is in some sense a property claim which, if it exists at all, is one in conversion or in some form of trust or equity, but which is not to be found in his counterclaim.

33. I have sought in this judgment in deference to the hard work and elegant submissions that Mr Tropp has made to cover the ground which he has sought to put before the court carefully and fully, by reference to the jurisprudence, by reference to his submissions, both written and oral, but the sum of it is this, that I can find no error of law in the judge's judgment and I can find no analysis or issue in Mr Tropp's submissions concerning his counterclaim which leads me to feel that it would be an injustice to him, or indeed to other Names for whom he seeks to speak, to leave the matter where it lies upon the judge's judgment below. In my judgment he has not shown me that there is any reasonable prospect for success on appeal, or that there is some other compelling reason why he should

be granted permission to appeal, and therefore I am obliged to refuse this application.

34. LORD JUSTICE BROOKE: I agree. The application is therefore refused.

ORDER: Application refused.

APPENDIX D

2002/848

Neutral Citation Number: [2004] EWHC 3335 (Comm)
IN THE HIGH COURT OF JUSTICE
COMMERCIAL COURT

Royal Courts of Justice
Strand
London WC2

Friday, 5 November 2004

B E F O R E:

MRS JUSTICE GLOSTER

LLOYDS

(CLAIMANT)

- v -

R A TROPP

(DEFENDANT)

Tape Transcript of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR N YEO appeared on behalf of the CLAIMANT
MR TROPP appeared in person

J U D G M E N T

(As Approved by the Court)
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1. MRS JUSTICE GLOSTER: This is Lloyds' application to have Mr Tropp's counter claim struck out. Mr Tropp was a former name at Lloyd's. Lloyd's principal claim, to which this was the counter claim, was for recovery of Mr Tropp's premium under the Equitas reinsurance and run off contract which was an integral part of Lloyds' reconstruction and renewal plan implemented in 1996. Lloyds obtained summary judgment against Mr Tropp on 24 May 2004 from Gross J. Leave to appeal against that judgment was refused by Waller LJ.

2. Mr Tropp's counter claim falls into two distinct categories. First, there is a counter-claim for recalculation and restatement of his and his syndicates; and Lloyds' financial position, as a result of what Mr Tropp calls in his skeleton argument and in his statement of case "self-reinsurance to closing" and/or "self RTC-ing" and consequential reimbursement to him. Secondly, he counter claims damages for libel, slander and malicious prosecution or falsehood. He relies, in particular, upon certain settlement discussions in relation to his second head of claim, namely his defamation and related claims.

3. The application is made on the basis (a) that the counter claim does not disclose any reasonable grounds for bringing the claim, (b) that the defendant has no real prospect of succeeding on it, and (c), in relation to paragraphs 49 to 52, that they are an abuse of process. It is common ground that, in

such circumstances, under CPR Part 3.4, a strike out should only take place in clear and obvious cases where, in effect, the claims are clearly non sustainable or indeed fanciful.

4. By "self RTC-ing", Mr Tropp appears to be referring to the syndicate reinsuring to close at the end of the syndicate's accounting period in relation to all liabilities then on the syndicate's books, even if that happens to include long term liabilities, which themselves have been taken on as a result of another syndicate, or an earlier embodiment of the present syndicate, reinsuring to close at an earlier time.

5. Thus, for example, in paragraph 38 of his counter claim, Mr Tropp alleges that, in substance, Lloyds failed to supervise and regulate the market to prevent this RTC ing from happening and claims specific performance of the relief to which he says he is entitled and, in addition, damages. What he says is:

> "The defendant avers ... that there had been a systematic institutional performance failure by Lloyds, a failure to supervise in its market promotion capacity and to regulate under its statutory delegation of authority in turning its head to and consciously avoiding rather than seriously reviewing and providing relief for wrongful behaviour by particular agencies which victimise Mr Tropp and others on his particular syndicates."

6. He then alleges specifically that there an was endemic and continuing failure of corporate ethics and governance at Lloyd's and a pattern of

non-feasance, and of deliberate avoidance, by Lloyd's and its officers, of its supervisory, regulatory and institutional responsibilities. He says that it is because of such pervasive failures in governance, and, arguably, of moral courage that he, Mr Tropp, applies to the court for the remedies now sought.

7. He claims specific performance in the following respects; (a) that the reinsurance to close in relation to long-tail liabilities should be unwound (that is to say, reversed out of Equitas), (b) that any prior self RTC-ing should be also be wound back to the first syndicate, as though (in his words) he had entered into a arm's length RTC so as to re-open and run off that syndicate – that is the claim at paragraph at 40(S); (c) in paragraph 40 (A) and (G), and at paragraph 41, in effect, that there should be a recalculation and a restatement of his losses and his syndicate results and consequently Lloyd's' results; (d) at paragraphs 40 (C) to (E), under the heading "Internal discipline" and "Claw back", an order requiring Lloyd's to discipline managing agents and sue them to recover commissions. Finally, Mr Tropp's claim for damages is at paragraph 40 (B), where he claims a refund with compound interest and consequential losses based, on a recalculation of prior losses of the syndicates which he lists in schedule H to his counter-claim.

8. It is also relevant to refer to paragraphs 120, 130 and 146 of his helpful skeleton argument, where he sets out his claim in much greater detail. It became clear in the course of Mr Tropp's helpful and, at all times, courteous submissions to this court that, in effect, what Mr Tropp was submitting was not

merely a negligent breach of duty on the part of Lloyd's, but also a fraudulent and deliberate breach of duty on Lloyd's' part. I refer in particular to those three paragraphs and also paragraph 13 of his skeleton, where he summarises his evidence and, in particular, certain internal Lloyds documents including regulatory and tax filings for the UK and US governments and internal communication from Lloyds to its managing agents. These include: sample tax filings by Lloyd's for the relevant syndicates to the US Governments; sample Equitas' quotations prepared by an internal Lloyd's Working Group and other internal Equitas type quotations.

9. What he says and again I am only summarising -- is that one can see from the information which he has put before the court produced internally by Lloyd's that Lloyd's knew at the time of the claim that what Lloyd's had stated to Mr Tropp and the court in schedule 8 of the particulars was, in fact, not true. In paragraph 120, he says that Lloyd's knew perfectly well, when it attempted to collect the premium from him, that the amounts claimed in relation to the premium, related to liabilities in his long tail syndicates which to a considerable extent, were not true insurance losses because they failed the fortuity or uncertainty test required of a contract of insurance.

10. He says that the evidence to which he refers shows that by the time of R & R and, a fortiori, the date of the claim against Mr Tropp, Lloyd's knew that these liabilities were inevitabilities and that the syndicates were not truly writing insurance business, but simply taking over what were going to

be inevitable losses. He further contends that the sample evidence shows that Lloyd's knew that it was trying, in effect, to recover premiums from him in relation to future liabilities that were not truly insurance liabilities because such liabilities had been put fraudulently into his syndicate. Mr Yeo, on behalf of the Lloyd's, on the other hand, submits that each of the remedies fails because Mr Tropp cannot establish any liability on the part of Lloyd's claimed by Mr Tropp. First it is contended that Lloyd's is not liable for damages in negligence or for breach of duty at the suit of a name in relation to any discretion it has exercised, except in very limited circumstances and Mr Yeo referred me to section 14(3) of the Lloyd's Act 1982 to which I refer below. Secondly Mr Yeo submitted that Lloyd's is not under any obligation to supervise the underwriting decisions of managing agents, nor to protect names from breaches of duty of their agents, nor to regulate the business of insurance at Lloyd's with reasonable care. In short, he submitted, relying on **Society Of Lloyd's v Clementson** [1995] CLC 117 that there is no assumption of responsibility on the part of Lloyd's to supervise underwriting decisions of managing agents. This applies equally to a managing agent's decision as to what business to accept from another syndicate, which is looking to reinsure to close irrespectable of whether that other syndicate is at arm's length. Likewise he referred me to **R (on the Application of West) v Lloyd's** [2004] 3 All ER 251 and the dictum of Leggatt LJ that was approved by the Court of Appeal in **West** at paragraph 17.

"17. There have been, as I have said, a number of decisions of the Administrative Court in which it was said that the decisions impugned in those proceedings were not amenable to judicial review. In R v Lloyd's of London ex p Briggs [1993] 1 Lloyd's Rep 176 the Divisional Court was concerned with a case in which members of Lloyd's challenged the legal validity of cash calls made on them by the managing agents of their syndicates. The court's conclusions on the issues that are relevant in the present proceedings were set out crisply by Leggatt L at p 185:

"It does not help to refer to the respondents as regulators or to describe the system administered by the Corporation of Lloyd's as a regulatory regime as is done in the Form 86 in these proceedings. The fact is that even if the Corporation of Lloyd's does perform public functions, for example, for the protection of policy holders, the rights relied on in these proceedings relate exclusively to the contract governing the relationship between Names and their members' agents. We do not consider that that involves public law. That is consonant with Mr Justice Saville's conclusion that a Name was not entitled to disregard a cash call made in good faith by the members' agents. We accordingly endorse [counsel's] submission that 'all of the powers which are the subject of complaint in the present application are exercised by Lloyd's over its members solely by virtue of the contractual agreement of the

members of the Society to be bound by the decisions and directions of the Council and those acting on its behalf.'.

Lloyd's is not a public law body which regulates the insurance market. As [counsel] remarked, the Department of Trade and Industry does that. Lloyd's operates within one section of the market. Its powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd's and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd's. In our judgment, neither the evidence nor the submissions in the case suggest that there is such a public law element about the relationship between Lloyd's and the Names as places it within the public domain and so renders it susceptible to judicial review."

11. Mr Yeo also submitted that it was clear that Mr Tropp's claim for an unwinding is tantamount to the rescission of numerous successive strings of reinsurance contracts. He relied on the decision of **Lloyd's v Leigh** [1997] CLC 1,398 (CA) and **Lloyd's v Fraser** [1998] CLC 1,630 (CA) which make it clear that Names cannot rescind their underwriting commitments, even if they were induced as a result of negligent or fraudulent misrepresentations since to do so would affect third parties. This was also a point made by Gross J in his judgment given on 24 May 2004 in these proceedings

at paragraph 16.5. Mr Yeo submits that the other claims for recalculation of commission and damages therefore fall away since they depend on an unwinding.

12. I should note, at this juncture, that, despite paragraph 12 of his written submissions, he did not rely on clause 5.5(b) of the reinsurance contract to submit that Mr Tropp was precluded from pursuing his counter-claim. Accordingly, I approach this application to strike out on the assumption that, despite the express provisions of clause 5.5(b) (which is recited in Gross J's judgment on the application for summary judgment), Mr Tropp is not precluded by that clause from bringing a counter-claim.

13. Mr Yeo went on to submit that Mr Tropp has suffered no loss, and therefore has no standing, in relation to any claim based on advance profit commissions paid under the triple profit release arrangements, since that arrangement (and thus the profit commissions) only apply to those underwriting in the years 1993 to 1995. Mr Yeo submits that Mr Tropp's last year of underwriting was 1991, and the fact that some of his syndicates may have been run off over that period is irrelevant. Therefore, the taking of such advance profit commissions did not adversely affect any of Mr Tropp's syndicate. That indeed seems to be the position on the evidence.

14. Mr Yeo also relied on the fact that, since Lloyd's has immunity from any damages claim, i.e, Mr Tropp's claim to a refund) by virtue of section 14(3), absent Mr Tropp showing bad faith or action in purely an administerial capacity (i.e without the exercise of discretion, Mr Tropp's case is doomed to

failure. He also submitted that the Court of Appeal has made it clear in **Price v Lloyd's** [2001] Lloyd's Reports AR 453 at 460 and **Laws v Lloyd's** [2003] EWCA Civ [1887] paragraph 69, that since Lloyd's owes no positive duty to supervise or regulate agents, mere inactivity on the part of Lloyd's cannot amount to bad faith so as to avoid section 13 of the 1982 Act.

15. However, Mr Tropp attempts to avoid application of section 14(3), and the immunity provided by that section, by submitting that, irrespective of whether or not Lloyd's had a positive duty to supervise or regulate agents, and irrespective of whether mere inactivity would amount to bad faith, on the evidence one sees not mere negligence or mere inactivity. On the contrary, he submits that Lloyd's active and actual conduct amounted to participation in effect -- and he did not shrink from putting it this high in fraud. Mr Tropp submitted that Lloyd's consciously abused its position because it knew there were no actual insurance liabilities; that therefore it was being deliberately dishonest when it came to seek recovery of the premiums from him because it must have known of the lack of fortuity and of the fact that the liabilities of his long tail syndicates were not genuine insurance losses because they failed the fortuity test. This was because, as I have said, he asserts that at the time Lloyd's bought those losses of the syndicate into the Equitas scheme Lloyd's was well aware that this business was not proper reinsurance to close insurance business, but was merely a means of transferring inevitable losses from one syndicate to Equitas.

16. The second way Mr Tropp seeks to avoid section 143 is by recharacterising his counter-claim as one brought against Equitas not Lloyd's, but that, as Mr Yeo points out, cannot stand up because the proceedings are clearly brought against Lloyd's not Equitas. Secondly, Mr Tropp seeks to argue that the immunity should be confined to a situation where an action is brought by a member of the community in his capacity as a Name as distinct from an insured policyholder or as the beneficiary of the Equitas Trust. Again, Mr Yeo submits, and I accept, that this is equally fanciful. They are not distinct categories or capacities; the latter two are subsets of the former. A person can only have the benefit of reinsurance to close, whether into Equitas or into another syndicate, if he is a Name. He is therefore a policyholder in his capacity as a Name.

17. For these reasons, and subject to the attempt by Mr Tropp to formulate the claim effectively in fraud, I accept Mr Yeo's submissions that in effect these counter claims are fanciful. They have, in my judgment, no prospect of success. I come to that conclusion myself, although if, and in so far as, the judgment of Gross J impacts on those views, I rely on it and come to the same conclusions as he did, for the same reasons as he did. Accordingly, I do not need to address the issue as to whether or not and, if so, to what extent, and on what issues, Gross J's conclusions were res judicata as between these two parties.

18. I turn next to the claim based on fraud, that is to say Mr Tropp's claim, as set out in paragraph 38 of his counter-claim and amplified in submissions

before me, that Lloyd's with knowledge, whether a deliberate shutting of its eyes, as explained in **Manifest Shipping Co Ltd v Uni Polaris Insurance Co Ltd** [2003] 1 AC 469 or consciously avoiding the problem, brought the losses of the relevant syndicates into the Equitas scheme, knowing that the business was not proper reinsurance to close. I again accept Mr Yeo's submissions that there is no adequately pleaded case in fraud or deliberate non feasance of duty such as can possibly survive a strike out claim. Nor, although I have looked at them carefully, do any of the documents that have been produced by Mr Tropp support evidentially what are at best unformulated allegations of fraud made in an attempt to get round section 43.

19. Accordingly, so far as the first heads of counter claims are concerned, I strike them out on the basis that they have no real prospect of success.

20. So far as the claims of libel, slander, malicious prosecution and falsehood are concerned, the words which are alleged to have been defamatory are said to have been made in Lloyd's pleadings and in statements to the Inland Revenue. In effect, what is said is that the statement made by Lloyd's that Mr Tropp owed Lloyd's his Name's premium in the amount pleaded, and that he had not paid such premium, were defamatory statements. I was taken to the relevant passages in Gatley on Libel and Slander. It is clear that, in so far as those words were used in Lloyd's pleading or witness statements, they are subject to absolute privilege, which even proof of malice does not lift. So far as the word were

used in a communication to the Inland Revenue, Mr Yeo submits, and I accept, that they were clearly justified because they were indeed true. The judgment of Gross J giving Lloyd's summary judgment for just that sum has, in the event, shown that Mr Tropp had no arguable defence to Lloyd's claims. Mr Tropp was liable and he had not paid what he was liable to pay. In those circumstances, it is impossible to see in my judgment how Mr Tropp can possibly have any claim, whether in libel, slander, malicious prosecution or falsehood since the statements were in fact true.

21. What Mr Tropp seems to be arguing, is that the truth of the statement cannot be maintained because of the settlement discussions that had been going on over a considerable number of years between him and Lloyd's. The claim here is somewhat unclear. What Mr Tropp seems to be saying is that there was some sort of estoppel operating which prevented Lloyd's from stating that he was indebted to them and, because of that estoppel, what were in fact true statements became defamatory. I find it very difficult to follow the logic of this argument. In any event, in my judgment, having looked at the entirety of the correspondence which I have been shown, that is to say both the correspondence which was before Gross J and subsequent settlement correspondence after 2 March 2000, Lloyd's made it clear at all times, first, that the settlement discussions were subject to contract; secondly, that although Lloyd's were in general terms willing to settle in order for such a settlement to be reached, Mr Tropp had first to execute a form of individual settlement agreement in

terms acceptable to Lloyd's and thirdly, that Lloyd's was not prepared to amend the terms in the way that Mr Tropp had requested.

22. In my judgment there is nothing in any of the further correspondence, or indeed in the earlier correspondence before Gross J, that suggests that Lloyd's made any relevant representations to Mr Tropp to the effect that it would not sue or that it was definitely going to settle. It is clear from the correspondence that, at all times, Lloyd's reserved its position, and made it abundantly clear that, if its terms were not met, it would reserve its right to sue, as indeed it did. Nor in my judgment does the correspondence disclose that Mr Tropp relied on any such representation.

23. Irrespective of whether that is issue estoppel between the parties or res judicata, I come to the same conclusion as Gross J on the evidence that Mr Tropp had not relied upon any settlement agreement being forthcoming during the first phase of settlement discussions. Gross J said:

> "I can see no reason even arguably against that background why the position later on should have been any different."

24. That being so, I see no basis upon which Mr Tropp could possibly succeed in relation to his claims purportedly based on defamation in malicious prosecution and malicious falsehood. Therefore I propose to strike them out.

25. Mr Tropp very fairly accepted that there was no concluded or binding agreement as between him

and Lloyd's to settle. The nub of his complaint was that they had indicated to him that they were in general amenable to a settlement. That is as maybe, but it was clear to him at all times that they were leaving their options open, as indeed was he.

26. Finally, Lloyd's seeks a declaration that in so far as Mr Tropp applied to add as defendants the proceedings past or present officers, employees or agents of Lloyd's, the claims that have been pleaded against these people are claims against them in their capacity as agents, and that therefore they should not be joined; and in any event that they are fanciful and an abuse of the process.

27. I have carefully considered the matters that Mr Tropp has urged on me as set out in a letter dated 4 November 2004 which I received this morning. He refers to the fact that, in his counter-claim, he has sought the joinder of various third parties, and the fact there is no separate application before this court for him to do so. Again I should make it clear that I take no technical point on the absence of any formal application before the court. I assume for the purposes of argument that there is such formal application before the court. Had I been minded to accede to Mr Tropp's application to add these persons as defendants, I would have done so irrespective of the absence of any formal application.

28. However, looking at the counter-claim and its paragraph 46, Mr Tropp seeks the joinder of the managing agencies, their controlling holding companies and all the individual controlling principals of each and various other parties as described in 46 (A) as well as a whole list of people

as set out in paragraph 46, including officers, employees and agents of Lloyd's and members of the Members Agency. In my judgment, in circumstances where I am striking out the counter-claim against Lloyd's, it is not an appropriate course, and indeed would be an abuse of process to leave these proceedings alive against these vast numbers of persons.

29. So far as the employees of Lloyd's are concerned, who clearly were acting in that capacity as agents, on well-established principles, there could be no joinder in any event because, absent some specific misconduct (which is not alleged here), an agent is not liable for the torts of his principal. Leaving aside that point, it seems to me that if Mr Tropp wishes to bring claims against his Members' Agents or his Managing agents, or indeed controlling principals, then he must bring fresh proceedings against such parties in which he properly formulates his cause of action against each identified person whom he seeks to join as a defendant. It is wholly unsatisfactory in what is basically a counter-claim against Lloyd's for him to seek to use these proceedings as a spring board into making claims against other persons in circumstances where I am striking out the counter-claim against Lloyd's.

30. Accordingly, I am not prepared to let this counter claim proceed. I shall strike it out. It would not be a legitimate function of court procedure to allow Mr Tropp to proceed to a full trial, merely in the hope that he will be able to obtain evidence to mount a case through discovery or cross-examination. This litigation is highly speculative

and, as I have said, in my judgment it does not disclose any reasonable prospect of success.

31. Accordingly, I propose to strike out the counter-claim on Lloyd's application.

32. I should say in closing that I am very grateful to both Mr Tropp and Mr Yeo, in particular in Mr Tropp's case for the very lengthy and helpful submissions which he made and the helpful way and courteous way in which he addressed his arguments to the Court. I am also similarly grateful to Mr Yeo.

APPENDIX E

A3/04/1441

Neutral Citation Number: [2004] EWCA Civ 1544
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(COMMERCIAL COURT)

Royal Courts of Justice
Strand
London, WC2

Tuesday, 2nd November 2004

BEFORE:

LORD JUSTICE WALLER

RICHARD TROPP

Applicant/Defendant

-v-

THE SOCIETY OF LLOYD'S

Respondent/Claimant

(Computer-Aided Transcript of the Stenograph
Notes of Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG

Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

THE APPLICANT appeared in Person

JUDGMENT

(As approved by the Court)

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1. LORD JUSTICE WALLER: This is an application by Mr Richard Tropp for permission to appeal an order made by Gross J on 24th May 2004 by which he gave summary judgment against Mr. Tropp in the sum of £463,881.28, that being the sum of £296,811.16, together with interest of £167.70.12. In making his attack on that decision Mr Tropp also attacks, first, the decision of Gross J dated 20th January 2004, in which he dealt with the question whether the English court had jurisdiction and whether there had been proper service made on Mr Tropp. He also attacks the decision that certain requests for further information and requests for disclosure under Part 18 and Part 31 were to be decided at the same time as the application for summary judgment, and he attacks the decision of Gross J in relation to certain of those requests which the judge refused. If Mr Tropp is to attack the order relating to jurisdiction of 20th January 2004, he will

need an extension of time in which to appeal. That also he applies for.

2. As Gross J correctly recorded, this is a further sad postscript to the upheavals in the Lloyd's market which took place some years ago. Mr Tropp, as he made clear in his concluding remarks to me, feels very deeply that he should be allowed a trial. He feels that he should be allowed to make the requests and insist on answers to the requests that he has made. He submits that it will be a blot on our system if he cannot have that trial.

3. We have a system, as do the courts in the United States, which allow for a summary process if the case is appropriate for a summary process. Of course, no case that is inappropriate for a summary process should be dealt with by a summary process. But the importance of having that process cannot be over-emphasised. It would be quite wrong for cases to go to trial if there were not issues to be tried. If issues go to trial, where the time of the court and the parties is taken up with dealing with issues which should not be there, there is a serious wastage so far as the court is concerned, and there is a serious wastage so far as the parties are concerned. If, for example, this case were even to go to an appeal at this stage, one would have to recognise that this would involve Lloyd's being represented, as well as Mr Tropp being present, and it would expose Mr Tropp to the possibility that he would have to pay Lloyd's costs if he lost. The same would go for a situation in which, if that court decided that there should be a trial, there would be a trial at which Lloyd's would be represented. If at the end of that

process there was no issue that had been fit to be tried, it would have involved expenditure which would have to be met by Mr Tropp. The question whether a case is suitable for trial and whether the summary process should be applied is an important one, and one which is in no way a blot on the system.

4. The sum claimed in this action and for which Lloyd's at present have summary judgment, represents the Equitas premium due pursuant to a reinsurance contract dated 3rd September 1996, entered into, on Lloyd's case, between Mr. Tropp acting through a Substitute Agent, Additional Underwriting Agencies (9) Limited ("AUA 9") and Equitas Insurance Limited ("Equitas"). The benefit of that right to premium was assigned by Equitas to Lloyd's, as is evidenced by a Deed of Assignment dated 2nd October 1996. That reinsurance contract was an integral part of the Lloyd's market reconstruction and renewal scheme, often called R and R. The history is well known and provides the context in which the reinsurance contract was entered into. Mr Tropp came into the category of non-accepting Names, in the sense that he did not accept the terms offered, although he suggests that he did accept other terms. Thus, in his written submissions he disputes that description.

5. As to the make-up of the principal sum claimed, it comprised various elements recorded in a schedule to the particulars of claim, and those elements are set out in paragraph 3 of the judgment of Gross J. They included losses declared to 31st December 1994 which were not called by 15th March 1996, deferred losses declared at 15th March 1996,

called but unpaid losses at 15th March 1996, including interest charged to 31st December 1994, interest and associated exchange rate adjustments from 1st January 1995 to 15th March 1996, and Equitas additional premium/release. The intention was that those figures making up the premium reflected the liabilities of the individual members, and thus the figures represented Mr Tropp's liabilities.

6. Mr Tropp does not criticise the direction which Gross J gave himself in relation to the relevant test as to whether a case was suitable for summary judgment. The judge set out a summary of that test in paragraph 4 of his judgment. It is unnecessary to repeat that here, but it is perhaps important to stress that the judge recognized that if a case should go to trial, then the court should allow it to do so, and that it is only in a case in which there is no realistic chance of a defence succeeding that summary judgment should be given.

7. The issues before Gross J involved, first, the proper construction of certain clauses of the reinsurance contract. Those clauses have been the subject of previous decisions, both of the Commercial Court and of the Court of Appeal. The second question -- indeed this took up the greater part of the judge's judgment -- was whether some compromise independent of the R and R scheme had been reached between Lloyd's and Mr Tropp, or whether at least such consensus as had been reached would give rise to some form of estoppel preventing Lloyd's bringing their claim against Mr Tropp. Thirdly, Mr Tropp took a point in relation to the substitute

agents appointed by Lloyd's to enter into the reinsurance contract. He submitted that AUA 9 was a mere dummy, that it could not exercise any underwriting judgment, that it was a creature of Lloyd's, and thus was an entity which on any view should not be entitled to agree on his behalf the conclusive evidence clause, even if there were other aspects which it could have legitimately agreed. He further took a point in relation to AUA 9, which was much the same point but in a different legal context, which related to the service of these proceedings on AUA 9, a matter dealt with by Gross J in his judgment of 20th January 2004.

8. It is right to set out at the outset the clauses of the reinsurance contract which should be considered. I will not read them out, having regard to the time. They are clearly set out in paragraph 6 of the judge's judgment, clause 5.5, 5.9 and 5.10. It is 5.10 which provides for conclusive evidence in the absence of "any manifest error".

9. In summary, what Gross J has ruled is, first, that AUA 9 was an entity and one recognized by the courts in previous decisions and thus that it had the authority to make the contract that it did and accept service, as was agreed to by the reinsurance contract. Second, the judge ruled that, none of the many points which Mr Tropp sought to argue gave rise to a manifest error in the figures, entitled him to sidestep the conclusive evidence clause and, thirdly, the judge held that there was no basis for asserting that there had been a compromise agreement reached, because the judge held that it was the clear understanding of the parties that

before final agreement was reached the same would be reduced to writing. No such writing ever eventuated as signed by both parties. The judge further ruled, in relation to the questions in Part 18 and Part 31, that albeit some questions should be answered, in the main the questions would not be material and thus should not be answered, having regard to the conclusion that he had reached in relation to the points on manifest error.

10. The test for me, as I indicated to Mr Tropp at the outset, is whether permission to appeal should be granted at this stage in relation to the various aspects of the judge's ruling. Permission to appeal should only be given where there is a reasonable prospect of persuading a full court that the decision which has been sought to be appealed should not have been made, or where there is some compelling reason why an appeal should be heard. I have to consider whether there is a reasonable prospect of success or a compelling reason in relation to the summary judgment that the judge gave. I have to consider that same question in relation to the arguability of the AUA 9 points in the different contexts in which they arise, and I have to consider and apply the same test in relation to the Part 18 and 31 requests and whether the question whether they should be answered should have been heard at the same time as the summary judgment, and whether they should have been ordered to be answered.

11. The logical place to start is with AUA 9. This is the second point which Mr Tropp argued before me this afternoon and the second point in his

notice of appeal. Mr Tropp suggests that he has evidence, which was not before the courts which have considered AUA 9 on previous occasions, showing that AUA 9 was simply a dummy under the control of the Lloyd's Corporation. He submits that the directors were effectively dummies of Lloyd's, that it was Lloyd's employees who signed documents on behalf of AUA 9 and, although he was prepared to accept that it might be appropriate to allow such an entity into many of the terms of the reinsurance contract, it was inappropriate that such an entity should be entitled to agree the conclusive evidence clause.

12. The attack on AUA 9 was an attack made, first, in the context of the jurisdiction issue. Gross J dealt with that attack in detail in his judgment given on 20th January 2004 (tab 34 of the bundles). The judge in that judgment deals with the various points that Mr Tropp takes, first holding that plainly AUA 9 is a corporate entity and indeed a separate corporate entity. He deals from paragraphs 17 through to 31 with the authority of AUA 9 and holds that AUA 9 would have and did have authority to act. He then also deals with the point taken by Mr Tropp in his written submissions relating to conflict of interest relating to the fact that the employees or the persons acting for AUA 9 were Lloyd's employees. He points out that in The Society of Lloyd's v Leighs the Court of Appeal recognized that AUA 9 validly acted as agent for Names. The judge in effect held that Mr Tropp's suggested basis for distinguishing that decision is simply unarguable. As it seems to me, the reasoning of the judge is impeccable in this regard. It is clear that in previous

decisions AUA 9 has been plainly recognized, and its connection with Lloyd's has been expressly recognized. In my view, insofar as Mr Tropp seeks now to attack the authority of AUA 9, either to agree any part of the reinsurance agreement or to be authorised to accept service, he cannot succeed and will not succeed in the Court of Appeal.

13. He stresses that his jurisdiction point is different from his authority point but in truth they do come to very much the same thing, because the question is whether AUA 9 had authority to make the agreement that it did. In that agreement it was a term that service could be effected on AUA 9, and once there is a consensual basis for effecting service that is an end of the matter. That deals with AUA 9.

14. It is convenient next to deal with the points that relate to manifest error. Ground 1 of Mr Tropp's grounds of appeal seeks to suggest that the judge applied too narrow a test of manifest error. In his written submissions he refers to a number of authorities but those authorities relate to different contracts. His difficulty is that the very clause and the very phrase "manifest error" in this particular reinsurance contract has been construed by this court in the past. He seeks to place a gloss on what Hobhouse LJ said in The Society of Lloyd's v Fraser. He seeks to suggest that the judge in his judgment has not followed accurately the guidance given by Hobhouse LJ (as he then was), but in my view the gloss that Mr Tropp seeks to place on Fraser is not an appropriate gloss. As I would read the judgment of Gross J, he has correctly directed himself by

reference to the proper construction of "manifest error" as indicated by Hobhouse LJ.

15. Mr Tropp then suggests that there are various matters that he should be allowed to argue as showing that there was a manifest error in the figures claimed by Lloyd's as part of his Equitas premium. The main thrust of his argument related to the limit which he suggests he placed on the type of business that was to be written. He explained that he was very much aware of the environmental risks which became the underlying cause of the enormous losses that Lloyd's suffered, and thus it was his instruction that there should be no environmental risks and indeed no long term risks which might carry with them those environmental risks. He suggests that environmental risks were written, but in particular he is critical of the fact that a very large percentage of the business taken on by his Syndicate was not new business but was business taken on as a result of the reinsurance to close. He suggests that when one looks at certain of the documents to which he drew my attention, which were tax returns, one can see that as much as 95 per cent, or thereabouts, of the business taken on by the Syndicate was this long tail business, including these environmental risks, and only a very small percentage was new business. He also suggests that some of the business written on his behalf was written in breach of duty by his managing agents or in conflict with other business written by them. He further asserts in his written submissions -- he did not suggest this orally -- that certain stop loss policies had been promised to him but had not been made available.

16. The problem with all these lines of argument is that they suffer in my view, and this was the view of the judge, from the same defect. They all involve criticisms of the managing agents or those who underwrote for the syndicates of which Mr. Tropp was a member. They may support claims that he may have or may have had against those managing agents, or those who underwrote for him, in relation to their failure to follow his instructions, but in considering whether the figures which Lloyd's put in their schedule H, and which are quoted in paragraph 3 of the judge's judgment, there is no room for an argument that there is a manifest error in those figures, simply by reference to claims that Mr Tropp may have had that some business should not have been written which he had given instructions should not be written.

17. So far as the stop loss is concerned, he takes another point. He asserts that certain of the proceeds have not been credited to him. This is a point that he has made in his written submissions. He did not expand in his oral submissions on it. The answer appears to be that, either the stop loss policy was successfully assigned so as to be able to take into account in the figures, in which event there will be no failure to take the stop loss into account or -- this is a point which Lloyd's accepted and is recorded in the judge's judgment -- if the proceeds were not assigned, then that stop loss is still available to Mr. Tropp. This argument does not provide any basis for arguing any manifest error in Lloyd's figures.

18. Before the judge Mr Tropp also took a point about having resigned in relation to the 1991 year

but before me he did not argue that he was not underwriting for that year. That he was underwriting for that year is in any event the effect of the evidence. Although he wished to resign the fact is that he was not able to resign so as to be able to relieve himself from the liabilities for that year. Again, that provides no arguable point on manifest error.

19. The position is that, insofar as manifest error is concerned, in my view the judge dealt with this fully, and there is no prospect of Mr Tropp being able to succeed in the Court of Appeal on any argument that he has put up in relation to it. There is no compelling reason for allowing him to run those points in the Court of Appeal. Indeed, as I sought to explain at the beginning of this judgment, it would be positively to his disadvantage to allow him to do. He would be liable for the costs of Lloyd's if allowed to do so.

20. That brings me to the question of settlement and the question whether there might be any estoppel which might prevent or should have prevented Lloyd's from commencing these proceedings. Mr Tropp was troubled about the fact that he did not have a proper opportunity to put together a bundle relating to this aspect before the matter was heard by the judge. Indeed, he explained to me that the bundle appeared to stop when there was further correspondence which it was material for the judge to see. Mr Tropp's difficulty is that if he wanted to run an argument that there was a complete agreement, then, whether or not Lloyd's were putting in another bundle, he had the

opportunity to put together such material as he wanted to put in so that this matter could be argued. It is not necessary to go further into that because he is not now suggesting that all the material is not before the court. When one examines all that material he is faced with the same difficulty as he was faced with before the judge. Mr Tropp says, in essence: "Surely a deal is a deal when two persons agree it over the telephone. Here I had a deal with the Chief Executive of Lloyd's. The Chief Executive of Lloyd's knows that he had a deal." Unfortunately parties can get very close to there being a binding agreement in law without there being a binding agreement. Indeed, when they get that close some might criticise one party who then reneges on what had apparently been achieved orally. Mr Tropp says that this is an instance where Lloyd's were agreeing to accept a figure of $5,000 and now have totally reneged on that figure. I have to say that I have some sympathy with Mr Tropp on that, as far as I have looked at the correspondence. But one thing is clear, and that is that the judge was right in law. Indeed Mr Tropp at one stage was constrained to accept that the judge was right, that nobody, neither Mr Tropp nor those from Lloyd's, thought that there would be a binding contract until, not only a figure had been agreed, but the details of the settlement agreement had been reduced to writing and signed by each side. As Mr Tropp at one stage put it, he would not have gone on asking for that document if he did not believe that until he had it he did not have a fully tied up deal. As I see it, there is no answer to the judge's point, that in this instance an agreement had not finally been reached as a legally binding agreement.

21. Mr Tropp would seek to argue for something less so as to give him some form of estoppel. That is an impossible argument. He either had an agreement under which there was a settlement and which would preclude Lloyd's from bringing this action or he did not. If he did not, then it seems to me that there can be no basis for holding that Lloyd's should be estopped in any way from bringing the action that they have. There is no prospect of persuading the Court of Appeal to take a different view from that taken by the judge in relation to settlement.

22. So far as the Part 18 and 31 requests are concerned, what I sought to get Mr Tropp to do was to identify any request for disclosure under Part 18 or Part 31 which went outside the points on which the judge had ruled that there was no arguable case on manifest error. I did that for obvious reasons, because if and insofar as the requests, which simply have gone to items which were not arguably manifest error, the judge was right in saying that he would not order disclosure or answers. At first, Mr Tropp explained to me one item which related to a question which the judge had ordered to be answered and which Lloyd's should answer, so that matter cannot help. He then went to two matters. The first related to what I can describe as the clawback point. Mr Tropp's assertion is that the agents have been deducting commissions and that Lloyd's were under an obligation to obtain those commissions as part of the deal that was done in connection with the R and R, and that if those commissions were taken into account, or if he could discover by requesting information that there were sums which Lloyd's had

failed to recover under clawback, that would affect his case on manifest error. It seems to me that in this area the judge was again right. What the judge said in paragraph 22 is this:

> "As to the application of various credits available, or said to be available to Mr Tropp, some, say Lloyd's, have been applied or if they have not been the failure is down to a Members' Agent not passing over the money or indeed to Mr Tropp. But be all that as it may, Lloyd's in any event has no obligation to allow any such credit against the monies claimed. (See Clause 5.9 of the Reinsurance Contract)."

As it seems to me there is no answer to that point.

23. On the next point Mr Tropp seeks to suggest that in some way, because of the deal done between Lloyd's and Equitas, in relation to the assignment of premium and the RITC debts, that this was a security arrangement, as the assignment itself makes clear. Thus he argues in some way he would have been released by the recovery that Lloyd's have made. This is dealt with in paragraph 23 of the judge's judgment where the judge said:

> "Mr Tropp's submission as to the assignment is likewise bad, essentially for the reason given by Mr Yeo in his skeleton argument:
>
> 'Whether or not Lloyd's has already recovered the amount secured by the assignment of the RITC debts does not affect Lloyd's title or ability to continue to collect those RITC

> debts, since the assignment was a valid assignment at law.'
>
> Further and yet again, even if all this is wrong the highest it can be put is that Mr Tropp has his remedy by way of counterclaim. Clause 5.5 it must be underlined and re-emphasised does not preclude counterclaims. But still no defence is disclosed to the Lloyd's claim."

As it seems to me, that again is right. There was an assignment of the premium due to Equitas to Lloyd's. Lloyd's are entitled to sue for that premium. In effect, it is not to the point that the amount of the RITC debt was secured by the assignment.

24. There is one other point which, although perhaps more minor, relates to the interest. Mr Tropp suggests that interest should not run from the date from which the judge suggested it should run. Mr Tropp was arguing that since Lloyd's effectively strung him along in suggesting that there would be an agreement, the interest should run from the time when the negotiations broke down. That was an argument put to the judge. The judge, in the exercise of his discretion, held that since Lloyd's were out of their money there was no reason why interest should not date back, no reason why it should run from some later moment. In reaching that conclusion the judge was exercising a discretion. In some instances it may be that a different judge might have taken a different view. The view that the judge took cannot be said to be wrong or such as would enable a court of appeal to interfere. There is no prospect of

persuading the Court of Appeal to reverse the judge on this aspect.

25. As I indicated at the outset, Mr Tropp will be disappointed with the result of this application which must fail. But, as I said at the outset, he must at least take comfort from this, that he will not have to meet the costs of Lloyd's with which he would have been saddled if he had been allowed to pursue a hopeless appeal at which they had been represented. In the circumstances this application for permission to appeal must be dismissed.

ORDER: Application refused; application for stay refused; application for permission to appeal to the House of Lords refused; application for a stay of the Part 18 question on quantum refused.

APPENDIX F

IN THE HIGH COURT OF JUSTICE

2004] EWHC 1397 (Comm)
CASE NO. 2002/848

QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 24th May 2004

Before:

THE HONOURABLE MR. JUSTICE CROSS

B E T W E E N :

THE SOCIETY OF LLOYD'S

Claimant

v

RICHARD ABRAHAM TROPP

Defendant

MR. YEO appeared on behalf of the CLAIMANT

THE DEFENDANT appeared in person

Transcript of the Official Tape Recording by
Sorene Court Reporting & Training Services

JUDGMENT
(As Approved by the Court)

MR. JUSTICE GROSS:

1. This case represents another sad postscript to the upheavals in the Lloyd's market of some years ago.

2. By application notice dated 11th March 2004, the Claimant ("Lloyd's") claims summary judgment under Part 24, CPR against the Defendant ("Mr. Tropp") for:

> "1. The sum of £296,811.16...
>
> 2. Interest in the sum of £236,748.63 up to 19 August 2002 and continuing at the rate of £48.79 per day...because the Defendant has no real prospect of successfully defending the claim and there is no other reason why the case should be disposed of at trial."

3. The principal sum claimed represents the Equitas reinsurance premium due pursuant to a reinsurance contract dated 3rd September, 1996 ("the Reinsurance contract"), entered into between Mr. Tropp and Equitas Reinsurance Limited ("ERL"), the benefit of which was assigned by ERL to Lloyd's, as evidenced by a Deed of Assignment dated 2nd October, 1996. Pausing there, the Reinsurance contract was an integral part of the Lloyd's market Reconstruction and Renewal scheme ("R & R"); the history of that scheme is well-known and provides the context in which the Reinsurance contract was

entered into. Mr. Tropp came into the category of non accepting names. As to the make-up of the principal sum claimed, it is comprised of various elements, recorded in Schedule H to the Particulars of Claim as follows:

"Losses declared to 31 December 1994 but not called by 15 March 1996	(£87,024.00)
Deferred losses declared at 15 March 1996	(£5,373.00)
Called but unpaid losses at 15 March 1996 (including interest charged to 31 December 1994)	(£95,085.00)
Interest and associated exchange rate adjustments from 1 January 1995 to 15 March 1996	(£9,371.00)
Equitas additional (premium)/release	(£114,439.00)
Total	(£311,292.00)"

4. There was no disagreement with the relevant test for summary judgment; both parties expressed themselves content with the summary which I

ventured in Babcock v Mitsui [2002] EWHC 2728 (Comm), at para. 24, where I said this:

> "In the light of the guidance given by *Swain & Hillman...and Three Rivers DC v Bank of England...*, an application under Part 24 should be approached as follows:
>
> (1) Ordinarily, disputes are to be resolved at trial, on the evidence and after completion of disclosure and other pre-trial procedures; in that sense, Part 24 confers on the court an exceptional power.
>
> (2) Properly used, the Court's power under Part 24 is a salutary power; it is there, ultimately in the interests of all concerned, to dispose of cases (or issues) that are not fit for trial at all.
>
> (3) The test of whether a case (or issue) is fit for trial, is whether there is a real prospect of the claim or defence, as the case may be, succeeding; "real" is equivalent to "realistic" and is to be contrasted with "fanciful".
>
> (4) It is not appropriate to utilise Part 24 for the purpose of conducting a mini-trial on the documents without disclosure and without oral evidence..."

5. In a nutshell, Mr. Yeo who appeared for Lloyd's submitted that the case was appropriate for summary judgment because, as a matter of law, Mr. Tropp had no real prospect of successfully defending

it. Mr. Yeo relied in particular on the following matters: (1) First, on the conclusive evidence provisions of cl.5.10 of the Reinsurance contract, subject only to manifest error of which none could even arguably be shown here; (2) Secondly, on cl.5.5 of the Reinsurance contract, which, in respect of the Equitas premium constituted a "pay now; sue later; no set-off" clause; (3) Thirdly, on the established principle that there was no question of Mr. Tropp having a right of rescission, which would impact to the detriment of third party policy holders. This approach, Mr. Yeo submitted, was supported by (at least) the following decisions: Society of Lloyd's v Leighs [1997] CLC 759 (Colman J); 1,398 (CA); Society of Lloyd's v Fraser [1998] CLC 1,630 (CA): Price v Society of Lloyd's [2002] 1 Lloyd's Rep IR 453 (Colman J). In the light of this legal framework, the reality was that Mr. Tropp's position was hopeless and summary judgment should be entered.

6. Before proceeding further, it is appropriate to set out the terms of cll. 5.5, 5.9 (given a point raised by Mr. Tropp) and 5.10 of the Reinsurance contract:

> "5.5 Each Name shall be obliged to, and shall pay his Name's Premium in all respects, free and clear from any set-off, counterclaim or other deduction on any account whatsoever including in each case, without prejudice to the generality of the foregoing, in respect of any claim against ERL, the Substitute Agent, any Managing Agent, his Members' Agent, Lloyd's or any other person whatsoever, and:

(a) in connection with any proceedings which may be brought to enforce the Name's Obligation to pay his Name's Premium, the Name hereby waives any claim to any stay of execution and consents to the immediate enforcement of any judgment obtained;

(b) the Name shall not be entitled to issue proceedings and no cause of action shall arise or accrue in connection with his obligation to pay his Name's Premium unless the liability for his Name's Premium has been discharged in full, and

(c) the Name shall not seek injunctive or any relief for the purpose, or which would have the result, of preventing ERL or any assignee of ERL from enforcing the Name's obligation to pay his Name's Premium.

5.9. ERL shall be entitled to set-off against the Name's Premium of any Name who is not an accepting Name any amount which ERL would otherwise be obliged to pay to that Name pursuant to clause 3 as reinsurer of any Syndicate 1992 and Prior Business insofar as it relates to any personal stop loss contract or estate protection plan of that Name.

5.10. For the purpose of calculating the amount of any Name's Premium as set out in

> Clause 5.1(b) and the amount of any Name's Premium discharged by the transfer of assets or the amount realised through the liquidation of Funds at Lloyd's for application in or towards any Name's Premium the records of and calculations performed by the CSU shall be conclusive evidence as between the Name and ERL in the absence of any manifest error..."

7. In his persistent but always courteous submissions in response to the application, Mr. Tropp made a large number of points which Mr. Yeo consistently for his part with his duty towards an unrepresented opponent, helpfully summarised as follows. There were, said Mr. Yeo, eight categories of alleged manifest error to be extracted from Mr. Tropp's submissions.

(a) "MSU determination outside 'intention of parties'...

(b) AUA9 had no authority to act for D...

(c) Settlement...

(d) Inclusion of all of his losses in APH syndicates...

(e) Failure to include specific 'credits'...

(i) Share of syndicate assets

(ii) Profits from syndicates.

(iii) PSL proceeds actual and accrued...

(f) Failure to include other more general credits arising from alleged misrepresentations, failure to regulate/investigate/claw back...

(g) Title to sue...

(h) Variation in reported total RITC debts..."

8. It is appropriate to say a little more about certain of the themes developed by Mr. Tropp in oral argument and drawn from this rather more global summary.

First, submitted Mr. Tropp, he had entered into an oral settlement agreement with Lloyd's. This agreement had been entered into orally between Mr. Tropp and Mr. Ron Sandler, then Lloyd's Chief Executive, on or about 24th/25th March 1997. The terms of the agreement were that

(1) Mr. Tropp would pay $5,000 in full and final settlement of his obligations.

(2) Mr. Tropp would sign a full release for Lloyd's and all other parties concerned.

(3) The "old" form of individual settlement agreement would be used, which did not require Mr. Tropp to acknowledge the debt due from him had there been no settlement, a figure necessarily substantially in excess of the settlement figure.

9. Secondly, the syndicates had not been undertaking insurance and Reinsurance business in the years in question, they had simply been carrying forward balance sheet losses from previous years when Mr. Tropp had not been a name on the syndicate or syndicates in question. Against this background, the calculation of the premium due from him was outwith the intention of the parties and/or there was manifest error. Manifest error, as was common ground, depended on contractual interpretation.

10. Thirdly, Mr. Tropp emphasised that he had no history as a litigating name. He did not wish to unwind the R & R scheme or the Reinsurance contract as a whole. He only wished to unwind a few syndicate outcomes. He had, he said, been placed in the wrong syndicates. He had given instructions that he should not be placed into the APH syndicates.

11. Fourthly, Lloyd's had no title to sue. It claimed as an assignee but had already recovered the amount secured by the assignment of the RITC debts.

12. Fifthly, Mr. Tropp had sought to resign in order to avoid being a name on the 1991 year, but wrongfully his Member's Agent had failed to give effect to his resignation. Lloyd's was answerable for that failure.

13. Sixthly, his syndicate reserves had been depleted, thereby inflating the premium set to be due from him.

14. Seventhly, against this background, summary judgment should be refused. All the more so when Mr. Tropp's numerous requests under Part 18 and Part 31 were taken into consideration. The information and documents which he sought and which it is unnecessary to set out here would shed light on the matters already summarised. Summary judgment should not be ordered without giving him at least the opportunity of obtaining such material.

15. Mr. Tropp added that he had placed before the court the most evocative items, as he put it, of the evidence in the case, but these were, he said, specimens or examples and, were the matter to go to trial, there would be more.

16. In my judgment the context of the present dispute and the applicable legal framework may be summarised as follows:

(1) It is necessary to distinguish sharply between the position of Lloyd's and the position of an individual Name's Managing and Members' Agents. In particular, as to Managing Agents in *Lloyds v Clementson* [1995] 1 Lloyds Rep. IR 307, page 330, Steyn LJ (as he then was) said this:

"... the name relies on and assumes the risk of the honesty and skill of his managing agent. Manifestly in the Lloyds system there is no assumption of responsibility by Lloyds to supervise the investment or underwriting decisions of managing agents. That does not mean

that Lloyds has a licence to act in bad faith for improper purposes or otherwise in an unlawful manner, but that merely means that such action would be *ultra vires*."

(2) The R & R scheme was both complex and fundamental to Lloyd's' ability to address the crisis facing the market by the early 1990s. The history has been set out very fully in previous decisions. For example, in Leighs (Colman J) at pages 761-2 and in Fraser (Court of Appeal) at pages 1634 and following. It suffices to set out here an extract from the Court of Appeal judgment in *Fraser* at pp 1635-6.

"By 1991 or 1992 it had become clear that the market was in a state of crisis. There was a risk that the claims which would be made upon Names or were outstanding were liable to overwhelm the resources of some of them. The Reinsurance structures within the market were themselves unlikely to be able fully to protect Names against their liabilities. Syndicates were finding it impossible to close certain years. Reinsurance to close was impractical or unavailable. This serious situation had substantially come about because of one or more of the various matters to which we have previously referred, but whatever their causes the difficulties for the market and all those involved in it

require to be addressed and the Society had of necessity to look for solutions and seek to provide remedies the 'R & R' scheme. The measures adopted involved the Society using its byelaw making powers. It effectively introduced a compulsory Reinsurance and Run-Off scheme. It was put to the members of the Society in 1996. An extremely lengthy and complex offer document was published. Those who signify their assent to and willingness to co operate with the proposal had the advantage of various financial arrangements which whilst not affecting their ultimate liability facilitated their discharge of it.

Those who did not accept the proposal, the non-accepting Names, were nevertheless required to Run-Off their outstanding liabilities in accordance with the reconstruction scheme and reinsure them as provided for in the 'Equitas' Reinsurance contract which was an essential part of the scheme. This contract provided a method whereby a single legal entity of assured ability and willingness to discharge the insurance liabilities of Names to those who had placed insurances in the Lloyds market from outside (as well as form inside the market) could do so in an orderly and assured fashion. Part of this Reinsurance scheme, which was effectively a Reinsurance to close, required the

> individual Names to pay a Reinsurance premium to Equitas which corresponded to an assessment of each name's outstanding liabilities accrued in the future down to the end of 1992. The contract or related contracts had also to make provision for the orderly application of the assets of the individual Names within the market, including their assets held by or formally held by their managing agents, their existing Reinsurance contracts, their various trust funds and deposits and the litigation fund which had resulted from the successful litigation of groups of Names against those who had culpably not discharged their duty of safeguarding the interests of Names. It was in the treatment of such assets that the settlement document primarily distinguished between those who accepted the scheme and those who did not."

It is by now beyond argument that the R & R scheme and the Reinsurance contract were both validly entered into.

> (3) The provisions of clause 5.10 are eminently understandable against the background of the R & R scheme. I can do no better than to respectfully refer to and adopt the observations in this regard of Hobhouse LJ, as he then was, in Fraser at pages 1658 9 and Colman J in

Price at pp 465-7 and 459. It is again necessary to read what they said. Hobhouse LJ said this:

"Clause 5.10 is drafted in comprehensive terms. It is not an unusual type of clause and is in principle appropriate to this contract. If as discussed in the preceding parts of this judgment... the applicants had been able to show that the Society or Equitas or CSU (now MSU) had misconstrued the contract, then it would have followed that the calculations would have had to have been reopened. But that is not the case. The records of and calculations performed by MSU are to be conclusive evidence of the amount of the name's premium as set out in Clause 5.1(b) and the amount by which it has been discharged by the transfer of assets or other sums realised, save for any manifest error. The calculations have been produced together with the figures upon which they are based derived from the records of the CSU. The exercise has been a highly complex one. It has necessitated the CSU in collecting and collating the figures from each syndicate of which the given name was at any material time a member. The resultant calculations led to the assessment of a Reinsurance premium which the name is required to pay under Clause 5.

The first argument of the applicants was

that they were entitled to inspect and check the accuracy of the records in the possession of the MSU and the figures derived from them. This submission involved a contradiction of both the express wording and clear intention of Clause 5.10. The MSU was the body which was charged with the responsibility for undertaking that task and it is the fruits of their work that are to be taken for the purposes of settling the liability of the name for his Reinsurance premium under Clause 5. It was argued that it was impossible to tell whether there was any 'manifest error' in the figures unless such an investigation was carried out. This too was a contradiction of the provisions of this clause. The figures are to be taken as correct unless in their own terms they manifestly cannot be correct or if the name by pointing to some other piece of evidence can demonstrate that they clearly cannot be correct in some respect. It is for the name to identify and demonstrate some clear error. The applicants who are relying upon this point have not shown any arguable case that they are able to do this.

It will be appreciated from what we have said that we have not accepted one of the arguments put forward by counsel for the Society, that only internal inconsistencies in the figures can be

looked at for the purpose of showing manifest error. Had, for an example, a name been able to show clearly that another name's data had been used in place of his that would have sufficed to show at least a arguable case of manifest error..."

Colman J. said this:

> (i) "The Reinsurance of the 1992 and prior underwriting years was fundamental to the R & R settlement scheme. The calculation of the Reinsurance premium was a matter of immense difficulty, not least because of the impact on market exposures of the LMX spiral. The reserving exercise necessary to calculate the global premium to be paid by the Lloyds market to Equitas was undertaken with great care and after taking comprehensive outside expert actuarial advice... The global figure thus arrived at was a consequence of a process of reserving by reference to the book of business of each syndicate and the part of the global premium attributed to each syndicate was derived from that syndicate's exposures. The members of the syndicate then became liable to pay what was called 'the Equitas additional premium' in accordance

with the extent of their participation in the syndicate...

(ii) The R & R scheme involved an offer being made to underwriting members of Lloyds which they were obliged to accept by September 1996. Whether they accepted or not they were obliged to pay the Equitas premium. They had to pay their portion of those losses which had been identified as accruing to their syndicates up to 15th March 1996, including those attributable to 1993. If they had accepted Lloyds offer in consideration of waiving all claims against those involved in the underwriting in respect of the 1992 and prior years, they were entitled to what were termed 'debt credits'... The impact of these debt credits was to reduce the total amount of what would otherwise be payable to Lloyds by the member. Payment of the Equitas premium was to be made to Lloyds and not to Equitas because... Equitas had validly assigned the right to payment of the premium to Lloyds.

(iii) As part of the process leading up to the putting forward of the offer contained in the settlement offer document, Lloyds provided to each member an indicative finality

statement in March 1996. This as based on syndicated declared results up to 31st December 1994. It showed an indicative or provisional calculation of the Equitas additional premium. Then in August 1996 Lloyds provided to each member a finality statement. This was based on the latest underwriting information and reserve figures in respect of each syndicate which had become available since preparation of the indicative finality statement. These were the figures by reference to which the underwriting members were to decide whether to accept the terms of the R & R settlement expressed in the settlement offer document. Again, it showed the amounts payable in respect of accrued losses and in respect of the Equitas additional premium.

(iv) Following the coming into operation of the R & R scheme, MSU sent out to all members an account notifying them of the amount which was due from each. If the member had accepted R & R debt credits should shown. If the member had not accepted R & R these would not be shown and no deductions would be made on that account..."

The further passage which I must read from Colman J's judgment is this:

> "Unless Mr. and Mrs Price can establish that there has been a *manifest*" --
>
> and the word "manifest" is italicised in Colman J's judgment –
>
> "error in the records of and calculations performed by MSU, those calculations are conclusive evidence of their Equitas premium by reason of Clause 5.10 of the Reinsurance contract. In other words, they are precluded from going behind the stated figures unless they can show an arguable case that the figures are obviously wrong. This was decided by the Court of Appeal in *Fraser*... I would add that given the circumstances described in my judgment in *Leighs*, which gave rise to the calculation of the market reserves and the consequent Equitas premium, it is hardly surprising that the Reinsurance contract should have contained a provision directed to preventing Names from challenging Lloyds' calculations. The reserving operation was a matter of no little controversy and the whole commercial viability of the R & R settlement rested on the certainty of Lloyds' premium calculations. On analysis... the real substance of Mr. and Mrs Price's complaint is that something must have gone awry with the reserve and premium calculations for their syndicate and that is exactly the area

of investigation which Clause 5.10 is designed to exclude..."

(4) As to the appropriateness of clause 5.5 and its impact I again have regard to the judgment of Hobhouse LJ in *Fraser*, where at page 1649 he said this:

"This was an R & R scheme within as has been held the powers of the Society. Clause 5.5 was an obviously appropriate part of the Reinsurance contract which was an essential part of that scheme. A no set-off clause is a standard type of clause... which is a standard clause found in Names agreements with their agents in Lloyds."

As *Leighs* made clear (CA at pp 1407-1408) this is so even if the claims against Lloyd's are claims in fraud.

(5) Names cannot rescind their membership of Lloyd's nor their underwriting commitments, even if they had been induced to take up membership as a result of negligent or fraudulent misrepresentations. That much is clear from *Leighs* and *Fraser*, both judgments of the Court of Appeal.

(6) Finally, it is plain beyond argument that Mr. Tropp was validly bound to the Reinsurance contract. *See Leighs* (again in the Court of Appeal) and the judgment which I gave on 20th January of this

year dealing with an earlier aspect of these proceedings at paragraph 19.

17. I would add only this in connection with manifest error and the judgment of the Court of Appeal in *Fraser*. The concluding wording of Hobhouse LJ was emphatically not an invitation to reopen the R & R scheme or the Reinsurance contract. The wording in Clause 5.10, "manifest error" and the linkage between those words and the prior wording "the records of and calculations performed", suggest that this clause necessarily has a relatively narrow meaning. It is certainly not an invitation to mount arguments based on the suggested inappropriateness of the underlying business of the syndicates or any anterior errors on the part, for instance, of Members' Agents in their conduct towards the name.

18. Against this background it is plain that most of Mr. Tropp's arguments are, with respect to him, hopeless and can be dismissed without further ado. Although at one stage it appeared that Mr. Tropp had a "wrong years" defence (that is, he was being charged for years when he was not on the syndicate or syndicates in question) on examination it became clear that his claim was not about that at all; it was a complaint about how the syndicates had been managed. But complaints about whether the Managing Agents were properly running the syndicate's business and whether such business was properly insurance or reinsurance business or, as Mr. Tropp put it, no business at all, do not lie against Lloyd's; even if they did, the most that they will do, given the provisions of the Reinsurance

contract, is entitle Mr. Tropp to advance a counterclaim. They would not provide a defence, let alone a defence with a real prospect of success to this claim.

19. Likewise the allegation that Mr. Tropp had wrongly, whether innocently, negligently or fraudulently been placed on the wrong syndicates, discloses no arguable defence and no manifest error, even arguably. In like vein complaints as to the syndicates depletion of their reserves go nowhere. As Mr. Yeo put it, these it may have been said by Mr. Tropp, either amount to kick-backs or a triple profit commission. It matters not. If they were kick-backs and there was misconduct that, at the most, could ultimately give rise to a counterclaim. So far as a triple profit commission is concerned, the only evidence before me is that those were allowed for in terms of the R & R scheme and are, in any event, subject to adjustment. But even if that were wrong or the contrary was arguable, it would matter not at all.

20. Equally, it is plain that it is not now open to Mr. Tropp to unwind any of his commitments or to rescind his participation in any syndicates. Such rescission, upon which I have already dwelt, would involve detriment to third party policy holders. Other suggested defences would involve going behind the premium calculations in precisely the fashion precluded by the authorities to which I have already referred. To take one example, a point Mr. Tropp raised about records, as it seems to me it is plain that it is only records produced for the purposes of the calculation in Clause 5.10 which are

relevant in this regard. Otherwise one is back to the argument unsuccessfully advanced by Mr. and Mrs. Price in the case to which I have referred, that something must have gone awry.

21. So far as Mr. Tropp's resignation defence is concerned, that too, I regret, is hopeless. Once rescission goes out of the window then the most that can arise from a resignation defence is that there was a fault on the part of his Members' agents. On the face of it, any such claim does not lie against Lloyd's at all. But let it be assumed that it did, the proper avenue is by way of counterclaim.

22. As to the application of various credits available, or said to be available to Mr. Tropp, some, say Lloyd's, have been applied or if they have not been the failure is down to a Members' Agent not passing over the money or indeed to Mr. Tropp (in the case of monies due under personal stop loss insurance) not signing the necessary assignment form so as to lay his hands on the money. But be all that as it may, Lloyd's in any event has no obligation to allow any such credit against the monies claimed. (See Clause 5.9 of the Reinsurance contract.)

23. Mr. Tropp's submission as to the assignment is likewise bad, essentially for the reason given by Mr. Yeo in his skeleton argument:

> "Whether or not Lloyd's has already recovered the amount secured by the assignment of the RITC Debts does not affect Lloyd's title or ability to continue to collect those RITC Debts, since the assignment was a valid assignment at law."

24. Further and yet again, even if all this is wrong the highest it can be put is that Mr. Tropp has his remedy by way of counterclaim. Clause 5.5 it must be underlined and re emphasised does not preclude counterclaims. But still no defence is disclosed to the Lloyd's claim.

25. I should add by way of some small comfort that so far as the PSL funds are concerned it would appear that the money is available to be credited against any sums due from Mr. Tropp to Lloyd's, provided only he signs the requisite assignment form. For clarifying that I am grateful for Mr. Yeo and those instructing him.

26. Still further in the light of all these matters, it is apparent that the provision of further information and disclosure in respect of the issues with which I have so far dealt would prove of no assistance to Mr. Tropp in resisting the Lloyd's claim for summary judgment. For that reason it would not be appropriate to hold up the application for summary judgment pending the granting of such disclosure or further information if Mr. Tropp was otherwise entitled to it.

27. Lastly in this vein, as Mr. Tropp himself has said, what he has placed before the court are the most evocative examples of the matters of which he complains. It follows that if those provide no defences then other examples cannot realistically be said to assist.

28. In summary so far the proposed defences with which I have dealt either do not disclose any arguable complaint against Lloyd's or they fall foul

of Clauses 5.5 or 5.10, at most they give rise to a counterclaim, or fail to disclose manifest error, or they are precluded by authority binding on me. That the scheme should be stringent and fairly narrow is hardly surprising. For Lloyd's to put together a settlement of this nature, as embodied in the R & R scheme, it was necessary to achieve certainty on the calculations of the Equitas premium and necessary to ensure that monies were paid without set-off or other deduction.

29. There remains the question of whether a settlement agreement was arguably entered into. As it seems to me, this issue requires closer examination. It is certainly clear that if there is an arguable defence of settlement then that would entitle Mr. Tropp to leave to defend and would result in, at least so far as the settlement question was concerned, the dismissal of the part 24 application.

30. The question of settlement is to be addressed in two periods. The first concerned, as I understand it, a period of, roughly, 8th November 1995 to 28th October 1996. Here, as I understood him, Mr. Tropp claims to have been strung along. It is not entirely clear whether he says that there was a settlement at this time. This period I should note does not concern Mr. Sandler at all. As it seems to me, anything short of an allegation of settlement would not assist Mr. Tropp, but in respect of this episode any allegation of settlement is hopeless. I need only read from one letter and that is Mr. Tropp's own letter of the 16th November 1995, to a Mr. Harboard Hamond of Mr. Tropp's Members' Agents:

> "You will be aware that last week financial recovery and I had reached agreement in principle on a settlement, nonetheless the documentation remains to be drafted (by the Society's counsel) and executed by both sides. I am hopeful that this will occur, but pending the moment of mutual execution settlement has not yet happened. In contemplation of the possibility that it yet may not, it is only prudent that I continue with measures to establish the readiness to execute instead on some serious unpleasantness should our agreement not go to documentation within the next couple of weeks."

31. It is plain from that passage that Mr. Tropp himself did not for a moment think there had been a settlement and it is also plain from the final lines of that passage that Mr. Tropp, although hoping that there would be a settlement, was gearing himself up to take such action as he thought appropriate to guard against the possibility that it might not happen. This period does not therefore assist Mr. Tropp at all, but it may be relevant to the matters next to be considered because of the emphasis, understood by both parties, on the need for a settlement agreement to be in writing.

32. With regard to the alleged settlement agreement of the 24th or the 25th March 1997, it is pertinent to pull together a number of documentary exchanges. I start with the Lloyd's' internal memorandum from Mr. Sandler to Mr. Holden of 25th March 1997, on which Mr. Tropp placed

considerable reliance. The memorandum reads as follows:

> "I spoke last night to Rick Tropp. He is prepared to pay $5,000 in full and final settlement of his obligations. He understands that his funds at Lloyds either have been or will be drawn down. I told him that this offer was acceptable and that you would be in contact with him immediately in order to finalise the necessary legal arrangements. He is quite happy to sign a full release but is concerned that he is not called upon to acknowledge the gross total of his obligations. I assured him that we would not issue a writ against him whilst this process was being finalised, subject, of course, to the length of process being reasonable."

33. On 1st April 1997 a Mr. Meeson, an assistant manager in the financial recovery department, wrote to Mr. Tropp. He said this:

> "It has been brought to my attention that you have recently been in communication with the chief executive. I have been informed of the terms of your agreement and will now put that in place with our lawyers with instructions that the various documents should be sent to you as a matter of urgency..."

34. On 14th May 1997 Mr. Meeson sent a further letter to Mr. Tropp. In this he said that he had still not received the paperwork from the

lawyers, but said that he had not forgotten the matter and would revert as soon as possible.

35. On September 30th 1997 Mr. Tropp wrote to Mr. Sandler, saying, amongst other things, the following:

> "Your people obviously are not following through on their April and May promise of draft settlement language..."

36. On 19th May 1998 Mr. Coldbeck now, of the financial recovery department, wrote to Mr. Tropp and he said this:

> "I understand that you met with Michael Meeson recently, who requested that I write to you regarding the possibility of a settlement with Lloyds. As I understand it, a settlement has been agreed in principle, whereby you will pay to Lloyds $5,000 in settlement of your liabilities and enter into an individual Names settlement agreement. In this regard I have to say that the agreement is still in the process of being drafted. Nevertheless, I am enclosing a copy of the latest draft of that agreement for your information, but must stress that as yet it is a draft only. When the agreement has been finalised I will send you a copy for execution, but in the meantime if you have any queries please give me a call."

37. On 9th July 1998 Mr. Holden, the head of the financial recovery department, wrote to Mr.

Tropp in a letter headed "Subject to contract." He said, amongst other things, this:

> "I can assure you that our records reflect the agreement made, being that subject to you completing the individual settlement agreement (a copy of which will be sent to you in due course) a payment of $5,000 will be accepted in full and final settlement of your Lloyds liabilities..."

He suggested that the draft agreement would be available shortly thereafter.

38. On 16th November 1998 a further letter was sent from a Miss Singleton in the financial recovery department suggesting a draft form of agreement. Again this was headed "Subject to contract."

39. On 29th November 1998 Mr. Tropp wrote again to Mr. Sandler objecting to the standard form of agreement which had now been sent to him and in particular raising objection to the inclusion in that form of an acknowledgment of debt. Mr. Tropp said this:

> "At the most fundamental level were I to sign on to this I would be signing what I know to be untrue. I simply do not sign untruths. You will moreover recognise Clause 7.2 *inter alia* as being inconsistent with our discussion of March 97. The upshot of our discussion was that we agreed in principle on an individual settlement agreement in which Equitas was (we discussed this and you reassured me on it)

explicitly to play no part. This ISA was rather to be a non-contingent 'full and final' resolution and parting between Lloyds—not Equitas—and me. It was to be closure with, if you will, finality."

On 19th May 1999 Mr. Tropp wrote to Miss Singleton. He said this:

"Lloyds offered me in March 1997 an individual settlement agreement and I accepted. My acceptance and the discussion with Lloyds that led up to it was expressly premised on Lloyds assurance that I would not be required to acknowledge what the R & R finality statement had represented as 'my' 'debt' which I believe it not to be. This assurance by Lloyds was the fundamental predicate in reliance on which I agreed in principle with Lloyds at that time to settle. It was expressly understood on your side that this was the underlying context of our discussion and that I would not have agreed to settle absent Lloyd's dispositive assurance on this basic point... An 'individual' settlement agreement is what the term 'individual' suggests. One that is negotiated in its essentials satisfying both parties. This is what I agreed to and what your institution agreed to. The 'standard' agreement you now push me to sign is an oxymoron when considered together with the 'individual' one to which Lloyds agreed. The standard agreement is not a fulfillment of Lloyds' word given to me, but rather would be an

> unseemly reneging on the institution's word..."

40. On November 30th 1998 Mr. Tropp wrote again to Mr. Sandler. He was complaining of the stance then taken by Mr. Holden and Mr. Tropp summarised his complaint as follows:

> "In a word he will not keep the in principle bargain which you and struck over one and a half year's ago, and indeed he professes ignorance of it."

41. There then follows a note made by Mr. Sandler himself to Mr. Holden. There was some debate about the correct dating of that note. I cannot for today's purposes resolve it, but fortunately the date does not matter. It said this, commenting on a further document received from Mr. Tropp:

> "For the record I have never discussed with Rick the specifics of any settlement (other than the amount) and have not reached an 'in principle agreement' regarding the substance/wording of any settlement... He has referred repeatedly in the past to his 'counter-measures' which he now plans to activate. Interesting to see what they will be!"

42. Nearly finally, on the 2nd March 2000 there was a still further letter from Mr. Tropp to Mr. Holden. He said he had been taken aback by the stance taken by Mr. Holden. He, that is Mr. Tropp, was simply intent on implementing the substance of the agreement which he said he had. He said further

that if Mr. Holden was now refusing to proceed with him then Lloyd's would be reneging on an agreement its chief executive had made. He continued:

> "This would put Lloyds into the position of being in breach of contract with me after a teasing almost three years of having led me on to believe that you would execute on an ISA-three years during which in detrimental reliance on Lloyds word I have foregone pursuing available remedies to get recovery."

43. Subsequently Mr. Tropp himself drafted the terms for an individual settlement agreement. It was not a particularly short document; it was single spaced and some three pages long.

44. Finally in this chunk of correspondence or exchanges, on the 2nd March 2000 Mr. Holden wrote to Mr. Tropp thanking him for his letter of 27th February enclosing Mr. Tropp's version of an individual settlement agreement. Mr. Holden continued as follows:

> "You have been advised on numerous occasions that the standard agreement with a non-accepting name (the agreement) is not open to negotiation or amendment, although I did agree to a minor amendment to the agreement during our telephone conversation of 15th December 1999, which was a concession to you alone. Accordingly, the version of the agreement that you have submitted is unacceptable to Lloyds. As it would appear that you are not prepared to execute the agreement in its present format,

> the offer of settlement is now withdrawn and Lloyds will pursue such action as it deems appropriate to recover the amount of your gross liability together with interest and costs thereto. I appreciate that this is not the response that you would have wished for, however matters cannot be left in abeyance indefinitely."

45. There was no statement from Mr. Sandler himself, apart from the note to which I have referred, but on his behalf Lloyd's deny that he had given any undertaking as to the form on which any settlement would be concluded.

46. Unfortunately, though the parties were within a whisker of settlement, they ultimately drew further apart. That is a matter much to be regretted, though it is not for me to assign blame and indeed I am not in a position to do so. The sticking point, as it appears, was the question of an acknowledgment of debt. The "old" ISA contained no such provision, the later form did. Mr. Tropp told me that he would not sign an agreement containing such an acknowledgment

> (1) Because he would be liable to tax or might be on the difference between the settlement figure and the acknowledgment of debt figure. He was apprehensive of the view which the United States IRS would or might take.
>
> (2) Because it was morally wrong to acknowledge liability when he did not think he was liable.

(3) Because in the event of Equitas failing he would be admitting liability in that figure in the event of any future claims against Names.

47. However, Mr. Tropp argued that Mr. Sandler had committed Lloyd's to a settlement on the old form. Lloyd's and Mr. Sandler were mistaken when they sought to say that he had not entered into any such commitment and had simply noted Mr. Tropp's concern. In short, Mr. Tropp said there had been an immediately binding oral settlement agreement in March 1997 on terms, amongst other things, that the old form would be used.

48. Although, as foreshadowed, this suggested defence did require closer examination, ultimately the position certainly as to the principal sum is clear beyond realistic argument to the contrary. I would not have been minded to give summary judgment if the matter hinged on the disputed question of what Mr. Sandler had said, whether he gave an assurance that the old form should be used or whether he simply acknowledged Mr. Tropp's concern. That, had it mattered, would plainly have been a triable issue. Instead I make the assumption most favourable to Mr. Tropp that Mr. Sandler did give the assurance for which he contends, namely, a settlement would be entered into on the old form without an acknowledgment of debt.

49. Here, as it seems to me, Mr. Tropp's argument begins to break down. Even assuming such an assurance had been given, it would not help Mr. Tropp unless it could be said that there was a real prospect of contending for an immediately

binding oral settlement agreement. But to my mind any such contention is fanciful. The reasons why there cannot even arguably have been an oral settlement are overwhelming.

50. First, there is the history of the previous episode of settlement negotiations. It is clear from those, not least in the letter written by Mr. Tropp himself, that the emphasis was on achieving a written settlement agreement. There was no intention to conclude an oral settlement agreement.

51. Secondly, it is simply inherently implausible, to the extent of being fanciful, that in this context there would have been an oral settlement agreement or that both parties intended to agree one. There is the complexity of the matter, there is the question of assignments and recoveries and there is the question of the involvement of third parties in any release. It is of course true that parties sometimes make mistakes and achieve an agreement where either one or both does not realise that such has been done, but I do not think, even arguably, that that situation arises here.

52. Thirdly, there is the question of language used in the lengthy exchange of materials which I have read. Those exchanges talk of a process of settlement, of draft settlement language, of agreement in principle, of agreements being subject to contract and of full drafts having been submitted. The language is redolent, if I may say so, of parties whose clear intention is only to enter into a binding agreement when there has been a written document properly executed.

53. Fourthly, so far as the old form itself goes, it is apparent from the way in which Mr. Tropp puts his suggested settlement agreement that it was not a case of simply incorporating the ISA lock, stock and barrel into the agreement. It was a question of addressing the old form ISA as part of the settlement process. Mr. Tropp very fairly said that he was not anticipating the old form word for word, but from his discussions with Mr. Sandler was expecting substantially if not exactly that. But as it seems to me, even taken at its most favourable, the parties must have been contemplating further negotiations on the precise wording of the old form with regard to what would finally enter into a settlement agreement.

54. Fifthly, the context was that of the R & R scheme. Oral agreements of settlement in that context would be a recipe for chaos and nothing in Mr. Tropp's contemporaneous communications suggested that even he thought otherwise. It is a feature of the exchanges that it is only much later that Mr. Tropp talks of an agreement or a breach of contract. In the earlier exchanges he is talking of no more than an agreement in principle and looking for draft settlement language.

55. For completeness, nothing less than an immediately binding oral settlement agreement can assist Mr. Tropp. Anything less than that could, in my judgment, amount to no more than a non binding agreement to agree. Alternatively, viewed as some sort of estoppel, it would entail achieving the same effect as a settlement agreement using estoppel impermissibly as a sword rather than a shield.

56. Finally in this regard, there is the question of Mr. Tropp saying that he relied on assurances and did not pursue other recoveries. I am bound to say, with respect, that I regard this as fanciful. First of all, as it seems to me, there is not even arguably a clear representation upon which he can rely. If, necessarily on this hypothesis, there was no binding agreement, then at the very most there was a suggestion of negotiations. Again, as it seems to me, and as Mr. Tropp well knew, those negotiations might or might not come to fruition. Secondly, it is fanciful to suggest that there was reliance. Going right back to the first episode in the settlement discussions, Mr. Tropp had made it clear that against the risk of settlement negotiations ultimately failing he was keeping his powder dry. I can see no reason, even arguably, against that background why the position should later on have been any different. In any event, it is plain that by 16th November 1998 when a different form of draft had been sent to him from that which he says he was expecting, it would have been clear to him that he could no longer rely on receiving some other form of agreement.

57. Ultimately, as it seems to me, on this matter the choice lies between an agreement subject to a contract necessarily in writing, or an immediately binding agreement with the writing only a formality. That question answers itself; only the former is a realistic candidate. In the circumstances there is, therefore, no useful purpose in ordering disclosure, or further information, or requiring Mr. Sandler to attend to be cross examined. In short, the defence of

settlement, subject only to the question of interest, with which I still have to deal, is not fit to go to trial.

58. The final matter is the question of interest. The point here is this: Mr. Sandler recorded the position on 25th March 1997 on the basis that no writ would be issued until the "process was finalised". As it seems to me, the process was not "finalised" until 2nd March 2000. What then of the question of interest? Mr. Tropp's submission was succinct. There was no question of a claim until the process was finalised. There was, he said, no question of any interest from before that date. In short, interest was not to run until after 2nd March 2000.

59. Mr. Yeo's response was equally succinct. Lloyd's had been kept out of its money. The suggestion that no writ would be issued until the settlement process had been finalised was a common sense and sensible measure while negotiations were continuing. If negotiations succeeded, all well and good. If they did not, all bets were off. Lloyd's was entitled to interest as claimed.

60. I prefer Mr. Yeo's argument. It seems to me that the very sensible interregnum while settlement discussions were underway was no more than that. If settlement was not achieved then there is no reason why Lloyd's should be kept out of the interest due on the debt which it is seeking to recover.

61. I add only this. Mr. Tropp asked that I should not enter judgment because of the adverse impact it would have on what I may respectfully term his good works in the developing world. I am

not sure for my part why that should be so, but even assuming that it is, that cannot be a reason on which it could be right to condemn both the parties to a trial on issues on which Mr. Tropp has no arguable prospects of success.

62. I accordingly decide that summary judgment should be given to Lloyd's for the principal sum plus interest as claimed. I shall look to Mr. Yeo, to whom I have been immensely grateful for his thorough and fair presentation, to draw up the order and explain it to Mr. Tropp.

63. *Postscript*: After the hearing, I received a lengthy letter (or submission) from Mr. Tropp, dated 9th June, 2004, together with attached schedules. Mr. Tropp invited me "to reconsider and vary" certain matters in the above judgment. Save to say that (1) I have had careful regard to this material and (2) with respect, I am not persuaded to make any variation to the judgment in the light of it, no further comment is called for.

APPENDIX G

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Richard A. Tropp, individually, and on behalf of all others similarly situated, Plaintiff-Appellant

v.

Corporation of Lloyd's, also known as The Society of Lloyd's, Defendant-Appellee

No. 08-2332-cv
November 12, 2010

Richard A. Tropp having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en blanc*,

IT IS HEREBY ORDERED that the petition is denied.

(5)

No. 10-1249

JUN 3 2011

IN THE

Supreme Court of the United States

RICHARD A. TROPP,
on behalf of himself and all others similarly situated,

Petitioner,

v.

CORPORATION OF LLOYD'S,
also known as THE SOCIETY OF LLOYD'S

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, respondent Corporation of Lloyd's, also known as The Society of Lloyd's ("Lloyd's") makes the following disclosures:

1. Lloyd's has no parent corporation.

2. No publicly held corporation owns 10% or more of Lloyd's stock.

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The Society of Lloyd's ("Lloyd's") respectfully submits this opposition to Mr. Tropp's petition for certiorari.

STATEMENT OF THE CASE

This case is the last in a series of dozens, involving hundreds of similarly-situated litigants, that applied well-settled law to the same underlying facts. Petitioner was a "Name" (individual underwriter) in the insurance market administered and regulated by Lloyd's. Judgment was entered against him in the courts of England for non-payment of a mandatory reinsurance premium (the "English Judgment"). The lower courts, agreeing with at least two dozen prior U.S. decisions (including seven separate circuit-level opinions) involving identical judgments against other Names ("Equitas Premium Judgments"), found the English Judgment entitled to recognition and enforcement under New York law. The case was procedurally unusual because Petitioner brought a declaratory judgment action rather than waiting to see if Lloyd's would sue him in the U.S., but that simply invoked another well-settled issue: nine circuits have unanimously agreed that the standard agreements signed by Names designating England as the exclusive forum for litigation between themselves and Lloyd's bar them from initiating litigation against Lloyd's in the U.S.

Petitioner's current attempt to claim that the state law under which the English Judgment was entitled to recognition is unconstitutional was not properly raised and developed below, lacks substantive merit, and would, in any event, not benefit Petitioner due to the facts of his specific case. He differs from the hundreds of other Names who have litigated and lost the same issues only in his litigation tactics. There is no reason for this Court to grant review.

Nature of the Lloyd's Market and the "R&R" and Equitas Transactions

The background facts are set forth at length in the district court's opinion (10a-29a)[1] and also described in numerous prior opinions. *See, e.g. Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Allen v. Lloyd's*, 94 F.3d 923 (4th Cir. 1996). We provide only a brief summary here.[2]

Lloyd's is not itself an insurer, but administers and regulates the London-based marketplace in which individual Names such as Mr. Tropp are insurers. 10a. There were over 30,000 Names as of the early 1990s, who had unlimited personal liability for underwriting losses. Names conducted their underwriting through various agents, who determined which risks to insure on the Names' behalf, and, as an administrative convenience, through "syndicates." 10a-11a. A syndicate was formed to write coverage for a particular year, and at the end of three years would be "closed" by the purchase of reinsurance to close ("RITC") in which another syndicate (typically the successor to the same syndicate for a subsequent year) would reinsure all of the unresolved liabilities on the insurance written through the closed syndicate in return for payment of a reinsurance premium. 11a. This finalized

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1. Petitioner's Appendix is cited as "__a."

2. Petitioner's account contains numerous inaccuracies, especially in its characterizations of what English courts decided and English law provides. Moreover, references to the complaint are irrelevant. Under Fed. R. Civ. P. 44.1 the district court properly evaluated the foreign decisions and legal context for itself and was not required to give any weight to Petitioner's self-serving allegations.

the profit or loss associated with the closed syndicate, with the relevant Names (after netting with their other underwriting results) receiving their profits or being called upon to pay their losses. 12a.

Under English law, Names had numerous potential remedies against their agents, including claims based on negligence or breach of fiduciary duty, but limited remedies against Lloyd's itself for claims other than fraud. 12a. The American courts have always understood this distinction. *E.g.*, *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1565 (2d Cir. 1993).[3] As Petitioner acknowledges, he, like all Names, signed a document called the General Undertaking in which he agreed to be governed by English law and to sue Lloyd's only in the courts of England. 13a. He fails to note that in the same document he also "irrevocably agree[d] that a judgment in any Proceeding brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction." 13a-14a, n.14.[4]

Massive losses in the early 1990s threw the Lloyd's market into crisis. In addition to claims arising from natural disasters and incidents like the Exxon Valdez oil spill, some syndicates had assumed substantial liabilities from prior years of account via RITC in return for

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3. The Petition's contention (at 12) that there is an inconsistency between the remedies U.S. courts understood were available to Names and the subsequent results of English litigation is the result of blurring the distinction between the remedies available against agents and those available against Lloyd's itself – a distinction *Roby* and other decisions made perfectly clear

4. Names also agreed to comply with Lloyd's bye-laws, including bye-laws that might subsequently be adopted. 13a.

premiums which in hindsight proved significantly too low for the ultimate cost of the reinsured risks. 16a. Beyond the size of the losses, traditional market mechanisms began to break down, leaving syndicates "open" (such that Names would need to keep paying for additional losses as they were realized for many years into the future) because they could not obtain RITC at any price. *Allen*, 94 F.3d at 927. Substantial litigation against agents and others potentially responsible for Names' losses arose in the English courts, and it became apparent that the total assets and insurance coverage of some such defendants might be inadequate to satisfy their potential liability. *Id.* Concern grew that a market collapse could lead to non-payment of valid insurance claims. *Id.*

Against this background, Lloyd's formulated the Reconstruction & Renewal ("R&R") program to avoid market insolvency, protect the interests of insureds, resolve the intra-market litigation, and assist Names in meeting their losses. 18a. R&R had two key components. First, all Names with account liabilities from 1992 and earlier would be reinsured by a single new entity named Equitas, which would manage and run-off those liabilities. 18a-19a. The amount, if any, each Name would owe as a premium for the reinsurance would depend on his particular mix of open syndicates and the valuation of their assets and estimated future liability.[5] Second,

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5. The calculation involved undertaking a comprehensive reserving project at a syndicate-by-syndicate level with actuarial, legal, and accounting input, lasting two and a half years with the involvement of the U.K. government. *See Soc'y of Lloyd's v. Leighs*, [1997] C.L.C. 759,775-777(Q.B.). While various technical terms were used at the time, "Equitas Premium" as used herein means the aggregate amount, if any, due from a Name based on his pro rata share of those various syndicate-level calculations, including

Names would be offered individualized discounts to their premiums out of a settlement fund totaling over $4.8 billion if they agreed to discontinue litigation and execute broad releases in favor of Lloyd's and numerous other market participants. *Allen*, 94 F.3d at 927. The decision to settle in return for a discount was voluntary (although R&R could not be effected without a sufficient percentage of Names agreeing to settle) but all Names were required to pay for the reinsurance into Equitas. Approximately 95% of the over 30,000 Names settled and R&R became effective. 20a. Bye-laws enacted by Lloyd's enabled the appointment of a substitute agent for all of the Names (including those who objected) and authorized that agent to bind the Names to the reinsurance contract with Equitas. 20a. Since 1996, Equitas has dealt with all claims on the insurance policies previously written by the reinsured Names, including those like Petitioner who have never paid their Equitas Premium.

Litigation then ensued against those remaining Names who owed money on their Equitas Premiums. 22a. Equitas assigned its litigation claims for non-payment of the Equitas Premium to Lloyd's, which then became the plaintiff.

The English courts resolved numerous threshold challenges to the mandatory nature of the Equitas reinsurance transaction, including: claims that the bye-laws requiring non-accepting Names to purchase the reinsurance were ultra vires and outside the scope of

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payment of losses already incurred but not funded. (Such losses were accounts receivable at the syndicate level, but obviously such receivables would be of uncertain value when transferred to Equitas unless paid.)

Lloyd's authority under English law; claims that the substitute agent appointed by Lloyd's could not have bound the non-accepting Names; and various attacks on the validity of the assignment of claims from Equitas to Lloyd's. *See, e.g., Leighs*, [1997] C.L.C. 759, *aff'd* [1997] C.L.C. 1398 (C.A.); *Soc'y of Lloyd's v. Wilkinson*, [1997] C.L.C. 1012 (Q.B.); *Soc'y of Lloyd's v. Fraser*, [1998] C.L.C. 1630 (C.A.), *aff'g* [1998] C.L.C. 127 (Q.B.). In upholding the bye-laws, the courts did not take a hands-off approach, but examined and accepted the substantive reasonableness of Lloyd's response to the crisis with which it was faced. *Leighs*, [1997] C.L.C. at 781.

One key issue was the "conclusive evidence" provision, which was upheld by the English courts. 23a. This provision simply means (*Ashenden*, 233 F.3d at 478) that the specific amount of the Equitas Premium calculated for a particular Name and executed by the substitute agent on the Name's behalf cannot be challenged except for "manifest error," such as internal arithmetic mistakes or, e.g., seeking to charge the Name reinsurance for syndicates or years on which he had not participated. Thus, the calculation of the incremental premium required for each of the hundreds of different open syndicates being reinsured could not be tied up for years in litigation, with Names avoiding payment by second-guessing the numbers because different actuaries or underwriters could have reached different conclusions on the same data.[6]

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6. No such issue would even have arisen if Lloyd's had taken a simpler approach such as simply charging each Name the same amount, or charging a premium proportionate to the amount of business each Name had conducted without attempting to value specific assets and likely future liabilities on a syndicate-by-syndicate basis, the fairer and more individualized approach Lloyd's took was not only more complex but inherently judgmental.

Once these threshold issues had been resolved, Lloyd's began to obtain Equitas Premium Judgments in England against Names. 23a. Approximately 300 such judgments were against U.S. residents. At the same time, many non-settling Names were pursuing claims of their own against Lloyd's. Several hundred of them joined together to pursue fraud claims against Lloyd's in England, which resulted in an extremely lengthy trial, with the finder of fact ultimately concluding that the Names had not proven their case. *Soc'y of Lloyd's v. Jaffray*, [2000] EWHC 51(Comm.), *aff'd* [2002] EWCA Civ 1101. Petitioner could have joined in this suit, but did not.

Relevant Prior Litigation in the U.S. Courts Between Names and Lloyd's

As noted above, the decision here was in complete conformity with two extensive and well-settled bodies of precedent.

First, over the course of the 1990s, various Names tried to sue Lloyd's (and/or other participants in the Lloyd's market) for damages and other relief in U.S. courts in violation of the General Undertaking. These efforts were uniformly rejected. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992); *Roby*, 996 F.2d 1353, *cert. denied*, 510 U.S. 945 (1993); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Allen*, 94 F.3d 923 (4th Cir. 1996) *mandamus denied*, 521 U.S. 1102 (1997); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998), *cert. denied*, 525 U.S. 943 (1998); *Haynsworth v. Corp.*, 121 F.3d 956 (5th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1988); and *Lipcon v. Underwriters at Lloyd's*,

London, 148 F.3d 1285 (11th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).[7] Those eight circuits were joined more recently by a ninth, which held that the General Undertaking likewise barred counterclaims brought by defendant Names in U.S. litigation commenced to enforce Equitas Premium Judgments. *Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94 (D.C. Cir. 2006). This present case appears to have been the only commenced by a Name against Lloyd's in a U.S. court in the last decade.

Second, Lloyd's filed lawsuits in the U.S. seeking the recognition and enforcement of English Equitas Premium Judgments under state law against Names who had not paid the amounts for which the English courts had found them to be liable. The first decisions holding in Lloyd's favor (*Soc'y of Lloyd's v. Grace*,718 N.Y.S. 2d 327 (1st Dep't 2000) and *Ashenden*, 233 F.3d at 473)) were ultimately joined by over twenty other decisions throughout the country, unanimously finding Equitas Premium Judgments to be entitled to recognition.[8] Those litigations collectively involved approximately 250 different defendant Names; others paid or reached consensual settlements with Lloyd's without litigation being instituted in the U.S.

Lloyd's has not filed any such actions against Names since 2006; all of the actions it has filed have now been concluded, and there is no particular reason to believe

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7. *Allen* specifically involved an attempt to obtain injunctive relief against the mandatory reinsurance by Equitas.

8. Other published appellate decisions include: *Siemon-Netto*, 457 F.3d 94; *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982 (10th Cir. 2005), *cert denied*, 546 U.S. 826 (2005); *Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002). A fairly comprehensive list of additional unpublished decisions is given at 8a n.3.

that any similar actions will be filed in the future.[9] There have been no additional Equitas Premium Judgments obtained by Lloyd's in England against U.S.-resident Names since 2004. Notably, the amicus brief filed by the American Names Association ("ANA") does not contend that any other U.S. Names of which it is aware or which it claims to represent are currently involved in litigation over the recognition and enforcement of Equitas Premium Judgments or are faced with the prospect of such litigation in the future.[10]

Petitioner's Underwriting and Litigation History

Mr. Tropp was a Name for the 1988 through 1991 years of account, underwriting policies generating approximately £1.4 million in premiums. On a net basis (with profits on some syndicates and losses on others) his underwriting proved unprofitable, as was the case for most Names during those years. He claims that his agents violated his express instructions not to place him

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9. Lloyds is still pursuing full collection in a handful of cases where the merits issues are final.

10. Lloyd's has not been in contact with the ANA for years, and had no reason to believe that it was not entirely defunct. Its anti-Lloyd's website (www.truthaboutlloyds.com) appears as of June 1, 2011 not to have been updated since 2006. Its current brief was filed by a lawyer who unsuccessfully represented the Names in *Soc'y of Lloyd's v. Blackwell*, 127 Fed. Appx. 961 (9th Cir. 2005). ANA Br. at 2. Mr. Ryan's clients in that case did not seek certiorari from this Court and, so far as the decision indicates, did not raise any of the federal constitutional claims Mr. Tropp now asks this Court to consider The English decisions the ANA complains about were all issued in or prior to 2000, so Names were free to raise these issues in *Blackwell* and the various other decisions unanimously recognizing Equitas Premium Judgments.

on syndicates underwriting particular sorts of risks and also that he would not have continued to underwrite for the 1990 and 1991 years of account but for misrepresentations by his agents concerning the availability of stop-loss reinsurance and the proper resignation procedure. 14a-15a. He began to refuse to pay his losses in 1994 (16a-17a), requiring over £50,000 to be advanced by the Lloyd's Central Fund to avoid non-payment of valid claims of his insureds. He refused to accept his R&R settlement offer, which would have given him a £281,077 (over 75% of the total owed) discount. He subsequently reached tentative agreement with Lloyd's on the price term of a very generous settlement that would have required him to pay only $5,000, but refused to reach agreement on other material terms, causing talks to collapse. 21a, 136a-144a.

Then, six years after payment had been due, Lloyd's sued Petitioner in England, and Petitioner counterclaimed. 24a, 27a. Lloyd's was found entitled to summary judgment against him for non-payment of Equitas Premium (which had grown to £463,881.28 with eight years of prejudgment interest) both in the trial court and on appeal (111a, 150a), and his counterclaims were separately dismissed for failure to state a claim, both in the trial court and on appeal. (74a, 94a). Those decisions were accurately summarized by the district court (23a-29a), and in any event speak for themselves. We deal here only with a few of Petitioner's mischaracterizations.[11]

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11. Complaints about the "pay now, sue later" issue (*Ashenden*, 233 F.3d at 478-79) are a red herring. All this meant was that Petitioner could not delay entry of summary judgment in favor of Lloyd's on its claim for non-payment based on having asserted counterclaims that had not yet been resolved. But those counterclaims ultimately were resolved favorably to Lloyd's,

As to what Petitioner calls his "wrongful liability" defenses, the English court found that they amounted to claims that but for the misconduct of his agents, certain risks would not have been underwritten. 132a. But that was no defense to payment, because Names were required to purchase reinsurance for the liabilities they actually had, not those they would have had but for the alleged misconduct of their own agents. This is straightforward agency law: if A's agent B wrongfully (but within the scope of apparent authority) binds A to an insurance contract with C, A is liable to C and must pursue an indemnification claim against B, with A rather than C bearing the risk that B may be judgment-proof. Because Equitas would have to pay A's obligation to C, the alleged misconduct of B was irrelevant to the amount that should be charged for that reinsurance. With the exception of a late and procedurally-improper attempt which was not followed up on (92a), Petitioner never pursued claims against his agents. [12]

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without Lloyd's having been able to collect its judgment in the interim. Indeed, "pay now" is a misnomer, since the English court adjudicated the merits of Petitioner's counterclaims despite his failure to pay the judgment.

12. Petitioner criticizes the district court's ruling on the adequacy of his remedies against his agents (39a-40a), which analyzed the English case law on the issue, without explaining how it was erroneous under Rule 44.1. And not only does he fail to explain why the "burden" of pursuing separate claims against his agents could possibly violate his Fourteenth Amendment rights, he fails to explain why he did not seek to pursue his remedies against his agents years earlier—even before Lloyd's sued him—as many other Names did. *See Richards*, 135 F.3d at 196 (noting other Names' substantial litigation recoveries against agents in English courts).

As to the English court's treatment of the so-called "missing assets" defenses, it made clear that Petitioner would be entitled to credit for his reinsurance ("PSL") if he executed required paperwork (135a) and that if other sums had not been properly credited to his account it would have been because of his agents' misconduct. 134a. The more fanciful claims he subsequently raised about huge sums said to have gone missing were noted to have been raised for the first time on appeal and outside the scope of his pleadings. 75a-76a. Moreover, the English court indicated it would consider the merits of at least three other defenses to the monetary amount sought by Lloyd's: (1) a "wrong years" defense (i.e. any claim that he was erroneously being charged for reinsurance with respect to syndicates or years in which he had not, in fact, underwritten)(132a); (2) an alleged prior settlement (which would have presumably limited his financial liability to the alleged settlement amount) (137a-144a); and (3) arguments that Lloyd's should not be able to obtain very substantial pre-judgment interest (149a).

Despite the fact that Lloyd's had taken no steps to sue him in the U.S., Petitioner then brought this action, which was dismissed by the district court for the reasons set forth in its lengthy and thoughtful opinion (6a-54a) and then affirmed by the Second Circuit.

REASONS FOR DENYING THE PETITION

I. MR. TROPP HAS OFFERED NO REASON FOR THIS COURT TO REVIEW THE UNANIMOUS CONCLUSION OF NINE CIRCUITS THAT THE FORUM SELECTION PROVISIONS OF THE LLOYD'S GENERAL UNDERTAKING ARE ENFORCEABLE[13]

In the almost four decades since this Court decided *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), perhaps no single proposition has been as clearly established in the lower courts as the validity of the Lloyd's General Undertaking; it has been held enforceable by nine separate circuits. This Court has denied review in all seven of the cases in which it was sought. Supra 7. The various circuits' decisions set forth at length their application of this Court's teaching in *Bremen*, as well as subsequent cases such as *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Petitioner has failed to explain how all of these circuits could have unanimously misapprehended this Court's rulings, or to point to anything that has changed since the last time this Court was asked to review the issue.

Moreover, as noted above, the wave of litigation between Names and Lloyd's in the U.S. courts has now ended, and Mr. Tropp is the only Name to commence U.S.

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13. Because this threshold venue issue is logically prior to the lower courts' alternative merits ruling on the English Judgment, we are addressing it first, as the lower courts did, although the Petition takes the points in reverse order.

litigation in violation of the General Undertaking in the last decade. All of his meritless attacks on the General Undertaking involve fact-intensive assertions about alleged deficiencies of English-law remedies supposedly unique to litigation involving Lloyd's.

Furthermore, Mr. Tropp claims error (Pet. at 35) only insofar as the General Undertaking prevented him from pursuing a vaguely-pleaded cause of action for an "accounting," not based on any federal or state statute or regulation.[14] But none of his groundless complaints about the scope of English remedies actually relate to this accounting cause of action, nor has he made any effort, either here or below, to show that his accounting claim would be in the least bit viable in New York if the General Undertaking had not been enforced.[15]

First and foremost, even if the accounting claim were not precluded by the res judicata effect of the English court's dismissal of Mr. Tropp's counterclaims, it would have been time-barred on its face. Mr. Tropp did not sue until 2007, but the transactions as to which he seeks an accounting would have occurred no later than 1996. In

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14. Because the lower courts elected in the alternative to reach the merits of the NYUFMJRA claims, the applicability of the General Undertaking to bar the preemptive declaratory judgment claim (without prejudice to his right to defend himself if and when Lloyd's had ever opted to bring a collection action) is now effectively moot.

15. His other claims about the inadequacy of remedies are difficult to follow as well as irrelevant to the claims he sought to litigate in the U.S. For example, he complains (Pet. at 16) that the English court held he had no contractual remedies against Lloyd's without disclosing that his English pleadings failed to invoke any "express reliance upon express terms of contract, or indeed implied terms of contract, between [himself] and [Lloyd's]." 61a.

New York, accounting claims are subject to a six-year limitations period, which would have run out in 2002.[16] Even if the time bar could be evaded, Mr. Tropp has not shown any material difference between New York law and English law applicable to accounting claims, nor has he shown that New York's choice-of-law principles would not mandate the applicability of English law.[17] This is thus the polar opposite of cases like *Richards*, where the plaintiff Names alleged causes of action under the federal securities laws which the English courts concededly would not entertain (under English choice-of-law rules), and the question was whether the different remedies available in England were sufficiently adequate to make the General Undertaking enforceable.[18] Here Mr. Tropp has not plausibly demonstrated that there would be *any* difference in substantive law if he were allowed to disregard the General Undertaking and litigate in New York instead of England.

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16. 1 Weinstein, Korn & Miller, N.Y. Civ. Prac ¶ 213.01 (2d ed. 2011); *Brooks v. Haidt*, 873 N.Y.S. 2d 563, 564 (1st Dep't 2009).

17. All of the relevant contacts here other than plaintiff's domicile would point to English law even without the choice-of-law agreement. Moreover, Lloyd's is akin to private American self-regulatory organizations such as the New York Stock Exchange. *Roby*, 996 F.2d at 1357 (drawing that comparison). Courts have repeatedly recognized common-law immunity from liability for the NYSE and similar entities that is even more protective than that available to Lloyd's under English law. *See DL Capital Group v. NASDAQ Stock Mkt. Inc.*, 409 F.3d 93, 97 (2d Cir. 2005); *D'Alessio v. New York Stock Exch., Inc.*, 258 F.3d 93, 106 (2d Cir. 2001). There is thus no claim that New York's choice of law rules would, much less would be constitutionally required to, disregard Lloyd's statutory immunity.

18. Petitioner has made no argument based on the securities laws, making the discussion in the ANA brief a complete non sequitur.

Finally, this would be a particularly inopportune time for this Court to devote its limited resources to revisiting its well-settled case law on international forum selection clauses because the legal landscape may be imminently changing. The United States has signed the Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 ("HCCCA"). While the Senate has not yet ratified HCCCA, the State Department recently announced (76 Fed. Reg. 26333 (May 6, 2011)) an open meeting for June 15, 2011 to solicit input into legislation for implementing the treaty. If and when the HCCCA is ratified, the lower courts will no doubt begin to encounter questions about how prior decisional law is or is not consistent with the new backdrop, and this Court will have the opportunity to provide appropriate guidance.

II. PETITIONER'S CONSTITUTIONAL ATTACKS ON THE UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT WERE NOT PROPERLY RAISED AND PRESERVED BELOW, AND THIS CASE WOULD NOT BE AN APPROPRIATE VEHICLE TO CONSIDER ANY SUCH ISSUE OF GENERAL CONCERN[19]

Almost four decades ago, this Court said "We cannot have trade and commerce in world markets ... exclusively on our terms, governed by our laws, and resolved in our courts." *Bremen*, 407 U.S. at 9. Over a half-century before that, the future Justice Cardozo said: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."

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19. Petitioner's certificate of service does not indicate that the Attorney General of New York was served as required by Rule 29(4)(c).

Loucks v. Standard Oil Co., 224 N.Y. 99, 110-11(1918). Rejecting such a provincial attitude, the various states have generally chosen to adopt balanced approaches to the recognition of foreign judgments.

A. This Case Was Not Litigated Below as a Constitutional Case

Petitioner has not asked this Court to review the lower courts' interpretations of New York statutory law in this case. However, to the extent they were raised at all, the constitutional arguments he now seeks to focus on were treated as throwaways in his briefing below. Indeed, of the total of 154 pages over five briefs submitted by Mr. Tropp in the district court and court of appeals, the point headings labeled as constitutional attacks on the statute ("NYUFMJRA") took up less than ten pages. Mr. Tropp now blithely asserts (Pet. at 4) that the law the English courts applied would be unconstitutional under *Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602 (1993) if adopted in an American jurisdiction, but *Concrete Pipe* was not cited even once by Mr. Tropp below. Likewise, *Tumey v. Ohio*, 273 U.S. 510 (1927) was never cited in the district court.[20] Instead, the district court's discussion on

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20. While the Second Circuit's correct application of *Tumey* did not turn on any disputed facts, Petitioner's meritless *Tumey*-based arguments are based on false factual assertions on questions where Lloyd's did not make a full factual record in the district court because the issue had not been raised. Similarly, the *Concrete Pipe* argument, raised for the first time in the Petition, is based on a false analogy between two different sets of complicated factual circumstances, but the record below in this case was not made with an eye toward rebutting a false analogy that Mr. Tropp had not yet asserted.

constitutional issues focused on, and rejected (53a-54a), Mr. Tropp's strained analogies to foreign libel judgments raising First Amendment concerns. Mr. Tropp essentially abandoned that argument in the Second Circuit but apparently seeks to revive it here.

B. The Petition's Failed Attempt to Conjure Up an Issue of "Growing Importance" Simply Confirms the Adequacy of Existing Law and Legislative Responses to Changed Circumstances

The wave of litigation involving the enforcement of Equitas Premium Judgments is now over except for this case. It is unlikely that the extraordinarily fact-bound nature of Petitioner's criticisms of English law would provide a good opportunity to address issues of broader interest to American courts and other litigants. But there is no pressing need for this Court to address any such broader issue. Petitioner refers (at 26-27) to cases raising First Amendment concerns, but does not mention that Congress has addressed these concerns by enacting a statute just last year that explicitly limits the recognition (in state and federal court) of foreign judgments in defamation cases that do not comport with substantive American First Amendment doctrine.[21] New York already provided similar protection.[22]

Petitioner also points to recent controversies about huge verdicts issued against American defendants in Latin American jurisdictions. But *Osorio v. Dole Food Co.*, 665

21. Pub. L. 111-223, codified at 28 U.S.C. §§ 4101-4105

22. CPLR 5304(b)(8)(adopted 2008).

F. Supp. 2d 1307 (S.D. Fla. 2009), applied Florida's similar statute to the facts of the case and *denied* recognition, hardly showing that the statute was unconstitutionally underprotective of American judgment debtors' interests. Likewise, in the high-profile case of *Chevron Corp. v. Donziger*, 2011 U.S. Dist. LEXIS 22729 (S.D.N.Y. March 7, 2011) (alluded to but not cited, Pet. at 27), the court relied on the NYUFMJRA in preliminarily enjoining a judgment against a U.S. defendant in Ecuador, similarly undercutting any claim that the current statute is unconstitutionally underprotective.

C. Petitioner Has Shown No Basis for a Constitutional Attack on the "System" Analysis Followed by the Vast Majority of U.S. Jurisdictions and Embodied in Section 5304(a)(1) of the NYUFMJRA

The NYUFMJRA compulsorily denies recognition to foreign judgments rendered under a "system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." This is not a quirk of New York law, but a key provision of the model Uniform Foreign Money Judgments Recognition Act ("UFMJRA"), originally promulgated in 1962 and eventually enacted in 32 states. Courts have consistently held the statute means what it says, i.e. that the American court is not to delve into idiosyncratic or case-specific complaints if the judgment was rendered by a judicial system which is fair as a whole.[23] As the Seventh Circuit

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23. NYUFMJRA does specify various other case-specific grounds for denying recognition, such as lack of timely notice and fraud on the foreign court, which are not present here.

said in *Ashenden*, "the statute, with its reference to 'system,' does not support such a retail approach." 233 F.3d at 477. Moreover, as a practical matter, the "retail" approach could be so fact-specific that it would "in effect give the judgment debtor a further appeal on the merits," which, among other things, would be "inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions." *Id.*[24] New York's Court of Appeals has held that the "relevant inquiry under...5304(a)(1) is the overall fairness of England's legal 'system,' which is beyond dispute." 4a (citing *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221 (2003)).

The question is not whether this "system" approach is obligatory, but whether it is within the range of constitutionally permissible options. In 2005, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") proposed a revised version of the UFMJRA, the Uniform Foreign-Country Money Judgments

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24. As the Seventh Circuit correctly observed, a judgment debtor's complaints about having been denied "due process" can rapidly shade into an attempt to obtain de facto appellate review in the American court of the foreign court's decisions on close questions of its own law of procedure or evidence. But it is clear that the foreign court's alleged error of law, whether substantive or procedural, is not a basis for denying recognition to the resulting judgment, anymore than a New York court can deny full faith and credit to a California judgment because it believes that the California court made errors of California law. *Clarkson Co. v. Shaheen*, 544 F.2d 624, 631 (2d Cir. 1976) (no basis to refuse recognition on "mere assertion ... that the judgment was erroneous in law or in fact"), *Pariente v. Scott Meredith Literary Agency, Inc*, 771 F. Supp 609, 616-617 (S.D N.Y. 1991) (refusing to conduct *de facto* appellate review of French tribunal's French law rulings).

Recognition Act ("UFCMJRA"). It retains the "system" test (§ 4(b)(1)), with commentary indicating that the *Ashenden* decision represented a good interpretation of that test, but also added a *discretionary* ground for non-recognition (§ 4(c)(8)) that "the specific proceeding in the foreign court leading to the foreign country judgment was not compatible with the requirements of due process of law." The new proposed statute did not *require* "retail" inquiry in any given case, but would merely give courts discretion to consider it.[25] The American Law Institute Proposed Foreign Judgment Recognition Act (the "ALI Proposed Statute"), also promulgated in 2005 although not thus far enacted, expressly considered but *rejected* a provision similar to the NCCUSL's proposed section 4(c)(8) because the ALI had reached a differing view on the policy question presented.[26] Instead, section 5(a)(i) of the ALI Proposed Statute is virtually in haec verba with the traditional "system" provision of the UFMJRA, and

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25. Petitioner seems to be arguing that the UFCMJRA's proposed section 4(c)(8) be *mandatory*, which is, so far as the Petition shows, not currently the law in any American jurisdiction.

26. At the time the ALI Proposed Statute was promulgated, the ALI's president was amicus Michael Traynor, whose brief (at 8) mentions the existence of this proposal without acknowledging that it contradicts Petitioner's current position. Presumably, the ALI does not encourage Congress to enact unconstitutional statutes, and it seems improbable that Mr. Traynor would have presided over such a high-profile proposal while harboring personal reservations that it was unconstitutional. The other amicus who signed the same brief is Geoffrey Hazard, who served as the ALI's director in 1987 when it issued the Restatement (3d) of Foreign Relations Law, Section 482(1)(a) of which endorses the "system" approach of the UFMJRA and does not suggest it has any constitutional infirmities.

comment c expressly provides that a "showing that the judgment debtor was not dealt with fairly in the particular case will not defeat recognition or enforcement" under that subsection, because "[s]uch a detailed inquiry into the foreign judgment is inconsistent with the pro-enforcement philosophy of the [proposed] Act."

States are free to adopt the UFCMJRA with its proposed section 4(c)(8) as an alternative to the UFMJRA; some have, but others, including New York, have not.[27] The NCCUSL did not suggest that the proposed discretionary ground for non-recognition is constitutionally required or the previous model statute it had recommended was constitutionally infirm; indeed, that would make it difficult to understand why proposed section 4(c)(8) is discretionary rather than mandatory.

Hilton v. Guyot, 159 U.S. 113 (1895), cannot help Petitioner. *Hilton* did not claim to be constitutionally-driven; rather it enunciated comity-based rules for recognition of foreign judgments in the absence of an applicable statute. The suggestion that *Hilton's* reference to a "full and fair trial" requires the "retail" approach is

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27. The HCCCA also has provisions related to the enforcement of judgments in cases where an exclusive forum selection agreement existed. Those provisions include permissive carve-outs for non-recognition that would permit a signatory jurisdiction to utilize a provision like section 4(c)(8), thus accommodating the current minority practice within the United States. That obviously provides no support for an argument that the Constitution requires the minority adoption of a discretionary ground for non-recognition to be transformed into universal adoption of a mandatory ground.

no more plausible than a claim that the same language requires denial of the recognition of judgments obtained without "full ...trial" through, e.g., the equivalent of American summary judgment practice. The very same sentence from *Hilton*, when expanded from the snippet selectively quoted by Petitioner, includes the phrase "a system of jurisprudence likely to secure an impartial administration of justice," 159 U.S. at 202, and has been relied on by both the ALI and NCCUSL as the basis for their "system" approaches. *See* §5, cmt. c, ALI Proposed Statute; § 4, cmt. 5, UMFJRA. Indeed, the Tenth Circuit held that *Hilton* required the court "to examine the entirety of the foreign judicial *system*, and not the particularity of individual judgments." *Reinhart*, 402 F.3d at 1000 (emphasis in original).

Petitioner has failed to show any reason why the policy choices made by the various states should not be respected, or how hitherto unknown principles limiting those policy choices could be found concealed within the Fourteenth Amendment. There is no reason here for skepticism as to the results of the legislative process.[28] To put it mildly, American judgment debtors who have failed to pay foreign judgments in favor of foreign judgment

28. This is the polar opposite of cases such as *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (Pet. at 28), where the concern is that parochialism will benefit in-state litigants at the expense of out-of-state adversaries. Here, Petitioner is perversely arguing that parochialism is mandatory and a more cosmopolitan attitude forbidden.

creditors are not a classic "discrete and insular minority" in need of special judicial solicitude.[29]

D. The District Court Correctly Held That Petitioner Was Not Denied Due Process in the English Proceedings

Although the Second Circuit found it unnecessary to reach the issue, the district court found in the alternative that "[n]ot only does the English system as a whole provide due process, there is no evidence that it denied due process in Tropp's particular case." 46a. As the court went on to note,

> at six separate stages in the proceedings ... the English system afforded Tropp an opportunity to be heard, and he submitted extensive briefings which were meticulously considered by judges. In turn, the judges issued 59 single-

29. Names refusing to pay their Lloyd's-related obligations have not generally been hapless underdogs with no access to the political process. Indeed, in 2001 members of amicus ANA were able to have special provisions inserted by Congressional allies into draft bankruptcy reform legislation which would have de facto overturned existing pro-Lloyd's precedents in the federal courts and placed Lloyd's at a unique disadvantage as compared to other foreign entities in litigation with U.S citizens. See Kathleen Day, *Bankruptcy Bill Benefits Chosen Few; Well-to-Do Investors Sought Special Provision*, WASH. POST, Mar. 10, 2001, at A1. The proposed legislation (which had severe constitutional flaws because of, among other things, how it singled Lloyd's out,) was criticized by the State Department (Steven Brostoff, *Powell Blasts Lloyd's Provision in Bankruptcy Bill*, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Mar. 19, 2001, at 1) and ultimately did not pass.

spaced pages of opinions (comprising some 178 separately numbered paragraphs). The fact that Tropp did not prevail in any of these hearings does not mean that the English system lacks due process.

47a.

Petitioner provides no cogent argument as to why the district court's fact-intensive and record-bound determination was erroneous. He argued at great length below that the English courts misconstrued English law, and indeed the McBride amicus brief devotes almost half its substance to claiming that the English courts misconstrued the intent of Parliament.[30] But this Court has made it clear in the domestic context that a disputed judicial interpretation of state law cannot be bootstrapped into a federal civil rights claim. *Gryger v. Burke*, 334 U.S. 728, 731 (1948) ("we are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then

30. Like the ANA brief, the McBride brief is essentially that of a "sore loser." Mr. McBride admits that he is no disinterested academic; rather (brief at 1 n.1), he is a barrister who apparently represented Petitioner in a failed attempt to get the European Court of Human Rights to intervene and overrule English law. None of his mischaracterizations of English law (which were not presented to the lower courts) are relevant to the NYUFMJRA's constitutionality. His contention that Lloyd's is viewed as a private entity in some legal contexts and a public or quasi-public entity in others is hardly scandalous. American SRO's are entitled to broad immunity because of their quasi-public functions, supra at n.15, while simultaneously not being treated as state actors in other contexts. *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 206 (2d Cir. 1999).

set up our own interpretation as a basis for declaring that due process has been denied"). The English courts were extremely patient with Mr. Tropp, gave him the benefit of the doubt in view of his pro se status, and carefully evaluated all the legal and factual contentions he made (many of which were foreclosed by binding English appellate precedent) before finding them insufficient. That is all that due process requires.

As for Petitioner's claim that he was denied a "due process" right to put on evidence disputing the amount of Lloyd's claim against him, what evidence may be presented in any case necessarily depends on its relevance, which in turn necessarily depends on the applicable substantive law. *Lindsey v. Normet*, 405 U.S. 56, 68 (1972) (state procedure did not violate Constitution by barring evidence which would not support valid defense under substantive law). In fact, the English courts permitted Mr. Tropp to dispute the amount of Lloyd's claim against him in at least four different ways described above. Supra 12. That none of these arguments ultimately prevailed does not raise any due process concerns.

Indeed, Petitioner has not cited any U.S. authority that a defendant in a civil case has a free-floating due process right to challenge the calculation of plaintiff's damages on any basis that can be imagined. When a contract contains a clear price term (as was the case here) and the goods or services have been fully delivered or performed but not paid for (as was the case here, since Equitas has provided Petitioner with full reinsurance protection despite his lack of payment), damages may be constitutionally awarded based on no more evidence

than the contract price.[31] His claim that he never agreed to that price is simply a variation of his claim that he never agreed to purchase the reinsurance at all, but was involuntarily bound to the contract. But whether Lloyd's had the regulatory authority to bind him and other Names to the contract (including its price term) was a question of substantive English law that has nothing to do with procedural due process. As the district court noted (48a), separate complaints about the substantive English law under which particular evidence was irrelevant cannot be squeezed into this due process analysis. *Ashenden*, 233 F.3d at 480 ("the cases that deal with international due process talk only of procedural rights").

The Second Circuit rejected Petitioner's *Tumey*-based claim because (5a), although "the UK courts gave conclusive effect to Lloyd's calculation of Tropp's liability, the UK courts themselves had no financial interest in the outcome of Tropp's case."[32] Petitioner makes no claim to the contrary, nor could he. The claim that *Tumey* goes beyond a guarantee of unbiased judges and somehow makes it unconstitutional for a neutral and financially-disinterested judge to apply principles of substantive law that permit one party to a voluntary private arrangement whose governing documents so provide (whether via

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31. In any event, Petitioner made no showing in the record below that he had evidence the English courts refused to consider which would have led any reasonable factfinder to conclude that the amount of his Equitas Premium fell outside the range of reasonableness.

32. In *Tumey*, the magistrate personally retained the fines he levied. 273 U.S. at 520.

contract or via the bylaws of a private organization) to calculate financial obligations due from the other despite an alleged financial stake in the determination is fanciful. No such principle can be determined from the cases cited, many of which were in any event not cited below.[33] In any event, such an improbable extension of *Tumey* would not help Petitioner because the underlying premise that Lloyd's had a financial interest in overcharging Petitioner for reinsurance coverage at the time his Equitas Premium was determined is simply false.[34]

Nor would the *Concrete Pipe* analogy never raised below have done any good if timely raised. In *Concrete Pipe*, Congress had intervened after the fact to change the rules applicable to pre-existing private arrangements—conferring on certain pension plan trustees a new statutory right to pursue "withdrawal" liability claims against employers who had formerly contributed to the plans but had never agreed (either by contract or the equivalent of a process for enactment of future bye-laws) to pay such liability. This was a key reason that the Court

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33. Except for *Tumey*, *Hilton* and *CIBC*, none of the cases cited in the Hazard/Traynor amicus brief (which focuses on the *Tumey* argument) were cited below.

34. As noted above, no factual record was made on this issue. Such a record would have established that Lloyd's incentive, if anything, was to make the premiums as low as possible (in order to encourage participation and voluntary payment by a high enough percentage of Names to make the R&R transactions feasible) while also making them sufficiently high for Equitas to be adequately capitalized to run off the risks it was assuming (and satisfy relevant regulators of that fact). Nor could Lloyd's have identified ex ante which Names would be in the tiny minority who would not pay their Equitas Premiums and need to be pursued in court.

determined that the trustee's determination of the amount due could not be unreviewable. Moreover, the Court determined that the trustee had a systematic incentive to overcharge withdrawing employers; by contrast, there is simply no basis to claim that Lloyd's had any structural incentive to overcharge Names in general, much less the Petitioner individually.[35]

In any event, the Seventh Circuit noted, *Ashenden*, 233 F.3d at 478, probably no foreign legal system has adopted "every jot and tittle of American due process" as set forth in our case law, and there can be no claim that those exact procedures must be followed for a foreign judgment to be recognized. *Concrete Pipe* is a perfect example of the sort of the "jot and tittle" presented by the evolution of Fourteenth Amendment doctrine that we should not expect any other country's judicial system to have adopted in precisely the same fashion. Indeed, in *Hilton*, this Court was not troubled by features of French procedure that would be unacceptable in our country, such as the use of unsworn testimony not subject to cross-examination. 159 U.S. at 204-205.

This point is particularly compelling here, since Petitioner expressly *agreed* to litigate his Lloyd's-related disputes under English law in English courts (as well as expressly agreeing to be bound by future Lloyd's bye-laws). Even if a defendant *involuntarily* haled into a foreign court might have some right to resist enforcement

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35. *See* supra n.34. Again, because of Petitioner's failure to cite *Concrete Pipe* below, no record was made on the numerous material factual differences between the Equitas/R&R transactions and the U.S. statutory scheme regulating multi-employer pension plans.

in the U.S. of the resulting judgment due to procedural variations from U.S. standards, Petitioner has made no showing whatsoever that such a right could not, as a matter of constitutional law, be waived. The Seventh Amendment right to jury trial can uncontroversially be waived by contract. Any number of constitutionally-mandated procedural protections available in an American court proceeding can uncontroversially be waived by agreeing to a binding arbitration agreement. Petitioner provides no argument whatsoever as to how the Constitution could prevent New York from deciding to enforce his voluntary agreement to be bound by English law as interpreted by English courts.

E. Petitioner Has Made No Showing that the "Public Policy" Exception of the NYUFMJRA Is Unconstitutionally Narrow

Section 5304(b)(4) of the NYUFMJRA gives a court the discretionary authority to decline to recognize a foreign judgment if "the cause of action on which the judgment was based is repugnant to the public policy of this state." Petitioner failed to convince the lower courts that the English Judgment should be denied recognition on this basis. Similar claims have been consistently rejected in other decisions recognizing Equitas Premium Judgments, both in New York and across the country. *Grace*, 718 N.Y.S.2d at 328; *Turner*, 303 F.3d at 333; *Ashenden*, 233 F.3d at 478-80; *Siemon-Netto*, 457 F.3d at 99-100; *Reinhart*, 402 F.3d at 995.

The claim that the "cause of action" is the wrong level of generality, because some contracts might violate public policy even though contract-based claims in general

would not, is a non sequitur, not a constitutional argument. Petitioner conjures up a speculative parade of horribles involving foreign court judgments enforcing contracts that were racially discriminatory or involved drug sales or prostitution, but points to no actual cases where U.S. courts have felt obligated to recognize and enforce such judgments on the theory that "breach of contract" was the only level of generality that could be considered.

In any event, the district court fully recognized (52a) that "Tropp is correct that the cause of action in Lloyd's case against him was not a run of the mill, or 'plain vanilla' contract claim." However, it proceeded (*id.*) to say "[r]egardless of whether such a scheme would be acceptable under New York contract law, we cannot say that the English courts' decision to bind the Names under these circumstances is repugnant to the public policy of New York."[36] It is well-established that New York will not find a foreign judgment repugnant to its own public policy simply because of differences in substantive law. *See, e.g. Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 79 (2006) (granting recognition to judgment where South Korean tort law permitted recovery on facts insufficient to support liability under New York law); *Ackerman v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986) (reversing

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36. Thus, the district court's analysis merely assumed arguendo that the details of the English substantive law applied here might differ from those potentially applicable in New York. Petitioner has never shown that a similar result would be impermissible under New York law, much less contrary to public policy, under analogous circumstances involving a private self-regulatory organization's ability to enact bye-laws binding its members to certain financial obligations considered appropriate to meet the challenge of a market-threatening crisis.

refusal to recognize German judgment). Petitioner offers no conceivable rationale as to why the Fourteenth Amendment could possibly obligate New York to adopt a more parochial public policy than it has freely chosen for itself, or, again, why any such right to avoid unfavorable foreign substantive law would be unwaivable.

F. Petitioner's Attempt to Constitutionalize Hostility to Foreign Court Judgments Would Have Substantial Negative Consequences for American Citizens and National Interests

As this Court said in *Bremen*, 407 U.S. at 9, "The expansion of American business and industry will hardly be encouraged if, not-withstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." Permitting Americans such as Petitioner who have voluntarily entered into profit-seeking business ventures in foreign countries with indisputably fair legal systems to flee the obligations those legal systems have imposed on them would obviously have dire consequences for other Americans willing to live up to their freely-assumed obligations. Foreign entities would need to reassess the litigation risk associated with doing business with Americans, or demand that any prospective American business partner maintain sufficient assets within the foreign jurisdiction to satisfy any potential liability that might arise. Enforcing voluntary agreements to litigate in a specified foreign forum, as this Court's case law mandates, is of limited practical use if there is no assurance that that forum's subsequent judgments will be recognized.

Even more significantly, constitutionalizing hostility to the recognition and enforcement of foreign judgments

would predictably make foreign judicial systems more hostile to the recognition and enforcement of American judgments entered against their own nationals. That would undermine the interests of American judgment creditors with claims against foreign defendants, possibly representing a much wider cross-section of American society than individuals who choose to engage in business ventures abroad. A traditional rationale for generous enforcement of foreign judgments in the U.S. is precisely to encourage similar treatment of U.S. judgments by foreign courts. *CIBC*, 100 N.Y.2d at 221. Reasonable minds can disagree as to whether that is the best policy, but the Constitution leaves state legislatures (and Congress) free to make that decision for themselves.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

RICHARD A. TROPP,
ON BEHALF OF HIMSELF AND ALL OTHERS
SIMILARLY SITUATED,

Petitioner,

v.

CORPORATION OF LLOYD'S,
ALSO KNOWN AS THE SOCIETY OF LLOYD'S,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Whether State Recognition Acts, As Applied By Most States, Comport With The Requirements Of The Due Process Clause Warrants This Court's Review.

The drafters of our Constitution took great care to establish procedural limitations on courts' power to deprive individuals of their property. Those constitutional protections, however, are largely bypassed when a court deprives a citizen of his property based on the judgment of a foreign court, obtained through proceedings not subject to American constitutional protections and potentially at odds with basic American conceptions of due process. Lloyd's does not contest that a state's enforcement of a foreign judgment is subject to Due Process scrutiny. And it acknowledges that in this case, the only scrutiny the Second Circuit afforded the procedural fairness of Lloyd's' U.K. judgment was to ask whether it was obtained through a *system* that is generally fair. Lloyd's further confirms that this is all the scrutiny that is afforded foreign judgments in the majority of states, pursuant to their enactment of the Uniform Foreign Money-Judgments Recognition Act. BIO 19-20.

Lloyd's nonetheless resists certiorari, arguing that such cursory review is all that the Due Process Clause requires. That claim, and Lloyd's' other grounds for denying certiorari, are meritless.

A. The Due Process Clause Does Not Permit Enforcement Of A Foreign Judgment That Was Obtained Without Adherence To Basic Due Process Principles Simply Because The Foreign System As A Whole Is Generally Fair.

Providing only system-level review of foreign judgments is at odds with the text of the Due Process Clause, which establishes an individualized right to a fundamentally fair process in every case, not simply a right to a system that ordinarily affords due process. *See* U.S. CONST. amends. V & XIV; Pet. 24-25.[1] A judgment may not be affirmed on appeal, despite the showing of a denial of due process below, simply because the trial court ordinarily affords due process. And even judgments entered by American states under the direct regulation of the Due Process Clause, and subject to Full Faith and Credit, do not escape all individualized Due Process review when enforcement is sought in another state. *See* Pet. 24-25.

Lloyd's nonetheless insists that the Constitution permits lesser scrutiny of foreign judgments. For this proposition, it cites to nothing in the Constitution or the constitutional decisions of this Court. Instead Lloyd's simply points to an alleged

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[1] Both the district court and the Second Circuit passed on petitioner's Due Process claim, Pet. App. 5a, 53a-54a, which he presented in detail to both courts, *see* Plaintiff's Memorandum of Law In Support of Summary Judgment Motion § C; Plaintiff's Reply Memorandum § III; C.A. Appellant Br. § III, *contra* BIO 17-18.

consensus among states and scholarly organizations. BIO 20-22. But even if policymaking bodies may find it expedient to forgo meaningful due process scrutiny of foreign judgments – in order to promote a unified world legal system, international trade, or other policy goals – that is hardly a ground for upholding the practice's constitutionality. The entire point of the Due Process clause is to protect individuals from procedural shortcuts governments might otherwise take in pursuit of other interests.

Recognizing meaningful constitutional limitations on the recognition of foreign judgments does not amount to "constitutionalizing hostility to the recognition and enforcement of foreign judgments." BIO 32. Foreign judgments can be respected without converting American courts into mere enforcement arms of foreign legal systems. It is not too much to ask that when a party seeks to use the coercive power of an American court to execute a foreign judgment, the court should first assure itself that it is not thereby becoming a party to a violation of basic due process rights.

B. The Due Process Standard For Enforcement Of Foreign Judgments Is An Issue Of Recurring And Increasing Importance.

Lloyd's asserts that this constitutional question is unimportant because of recent legislation and courts' ability to refuse enforcement of problematic foreign judgments on other grounds. BIO 18-19. That argument fails on its own terms, and misses the broader point.

First, the new federal statute addresses only defamation judgments and has no application to any

other kind of case, even if the judgment is patently incompatible with First Amendment (or any other constitutional) values. *See* 28 U.S.C. § 4102(a)(1); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (confronting non-defamation judgment that violated First Amendment principles).

Second, as illustrated by the scores of judgments Lloyd's itself has obtained in the United States, the First Amendment is not the only constitutional principle at risk from the lax scrutiny afforded foreign judgments from otherwise reliably fair judicial systems.[2]

More importantly, Lloyd's does not deny the Chamber of Commerce's report that a "growing number of notable actions . . . have been filed in foreign courts, with the plaintiffs seeking to obtain judgments they can enforce in the United States." JONATHAN DRIMMER, THINK GLOBALLY, SUE LOCALLY: OUT-OF-COURT TACTICS EMPLOYED BY PLAINTIFFS, THEIR LAWYERS, AND THEIR ADVOCATES IN TRANSNATIONAL TORT CASES 4 (2010). The possibility that some fundamentally unfair judgments may be denied enforcement on other grounds, BIO 18-19, is

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[2] Lloyd's' carefully worded statement that "there is no particular reason to believe that any similar actions will be filed in the future," BIO 8-9, ignores that Lloyd's continues to pursue collection on recognized judgments against many Names, *id.* 9 n.9; that it retains the right to bring new actions on current judgments, *id.* 8-9, and that if further capital infusions for Equitas become necessary at any time during the eighty-year life of the R&R Equitas trust, it has the right to sue tens of thousands of Names to cover the deficiency, *see* Pet. 17 n.14.

no excuse for foregoing direct scrutiny of the procedural fairness of particular judgments.

As Lloyd's itself documents, BIO 20-22, the degree of due process scrutiny given foreign judgments varies significantly from state to state. Lloyd's judgment in this case would have been subject to case-specific scrutiny in the states adopting the 2005 revision of the Uniform Act (although, inexplicably, the Act affords courts discretion to enforce a foreign judgment even after finding that it was obtained in violation of basic due process principles). *Id.* Such arbitrary variation in constitutional protection is untenable.

The continuing disagreement within and between the states, the ALI, and the NCCUSL, BIO 20-22, as well as the lack of any movement to enact federal legislation, demonstrates that only a decision from this Court has any prospect for restoring national uniformity and basic constitutional protections for citizens across the nation.

C. Lloyd's Alternative Grounds For Affirmance Provide No Basis For Denying Review Of The Ground Upon Which The Case Was Actually Decided.

Having little to say in defense of the decision the Second Circuit actually rendered, Lloyd's spends much of its brief hypothesizing other ways in which the court of appeals could have ruled in its favor but did not. BIO 24-30.[3] That a respondent may have

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[3] Notably, however, Lloyd's does not claim that the court of appeals' forum selection clause holding is an alternative ground

other defenses to raise on remand is no reason to deny review of the ground upon which the case was actually decided. *See, e.g., Abbott v. Abbott*, 130 S. Ct. 1983, 1997 (2010) (deciding question presented and remanding for adjudication of alternative defenses); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1610 n.3 (2010) (same). Moreover, Lloyd's' alternative grounds are waived and meritless.

1. Lloyd's argues that the U.K. judgment would satisfy any individualized due process scrutiny. BIO 24-30. But it did not urge affirmance on this ground in the Second Circuit,[4] and provides no convincing support for its assertion here.

The parties generally agree on the relevant features of the English system: Lloyd's was allowed to impose the R&R contract upon Names without their consent (BIO 5); the only ground for resisting Lloyd's demands for payment was proof of arithmetic or similar facially obvious "manifest errors" (*id.* 6); and although post-deprivation counterclaims were nominally allowed, the only way to contest liability for the reinsured debt or challenge its amount was to prove Lloyd's had engaged in fraud (*id.* 3). Accordingly, Lloyd's does not contest that under U.K. law, Tropp was required to pay whatever Lloyd's demanded even if he could show that Lloyd's was legally responsible for the reinsured debt (*e.g.*, because it breached its original contract with him by

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for rejecting Tropp's challenge to the enforceability of the U.K. judgment. *See* BIO 14 n.14; Pet. 34-35.

[4] *See* C.A. Appellee Br. 44-45.

permitting him to be placed in environmental syndicates, or by unlawfully refusing to accept his resignation) or if he could show that the amount of the premium was incorrect for reasons not amounting to manifest error or fraud (*e.g.*, because Lloyd's failed to credit him for assets owed to him and held by Lloyd's, including personal stop loss insurance). Thus, even if Tropp's wrongful liability and missing assets claims have merit – and even if, as a result, he actually owed Lloyd's nothing – the U.K. courts were compelled to order Tropp to pay Lloyd's what it demanded. *See generally* McBride Amicus Br.

That system of laws is wholly foreign to American notions of due process. The fact that U.K. courts heard Tropp out, before telling him there was nothing they could do, does not satisfy due process. *Contra* BIO 24-26. To return to an example from the petition – which Lloyd's ignores – there would be no question that a state violates Due Process by requiring immediate payment of disputed taxes and then claiming sovereign immunity to bar any refund action, even if the courts politely listened to the taxpayer before dismissing his refund claim. Pet. 30.[5]

Nor is it a defense to argue, as Lloyd's does, that the hearings were rendered pointless because of substantive law. BIO 26-27. The same would be true in the tax refund example – the claim would be

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[5] Nor has the New York Stock Exchange been permitted to use its common law immunity offensively to prevent challenges to its assertion of liability against its members. *Cf.* BIO 15 n.17.

barred by the substantive law of sovereign immunity. And the same would have been true in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). *See* Pet. 30-32. There, it was substantive federal law that purportedly allowed pension trustees to charge withdrawing employers whatever they thought right, subject to revision only upon proof of clear error. Yet this Court held that such limited review would likely violate the Due Process Clause. 508 U.S. at 626.

Lloyd's' only answer to *Concrete Pipe* is its insistence that in that case the employers never agreed to the limitations on review, whereas in this case, Tropp did. BIO 28-29. But Tropp no more waived his right to contest liability than did the employers in *Concrete Pipe*. While the U.K. courts are entitled to engage in fanciful fictions of consent for their own purposes, whether a judgment founded on such a fiction should be enforced in a U.S. court is a question of U.S. law. And Lloyd's cites no U.S. authority supporting its assertion that Tropp consented to waive his basic due process rights simply by agreeing to be bound by current and future Lloyd's byelaws. Were that the law, this Court just as easily could have held in *Concrete Pipe* that by agreeing to join a multiemployer pension plan that is obviously subject to current and future federal regulation, the employers consented to any

diminution in their due process rights Congress might subsequently enact.[6]

2. Lloyd's Statement also suggests that even though the R&R system precluded U.K. courts from inquiring into the merits of any of Tropp's claims, the courts nonetheless rejected his claims and defenses on the merits. BIO 11-12. This suggestion – also never urged as a ground for affirmance in the Second Circuit – is false.

First, Lloyd's asserts that the U.K. courts held that Tropp's "wrongful liability" claims "amounted to claims that but for the misconduct of his agents, certain risks would not have been underwritten" and that agency law principles precluded any defense against Lloyd's' suit based on that misconduct. BIO 11. But the U.K. court never reached that conclusion (and did not even mention the agency law principles Lloyd's attempts to insinuate into its opinion). *See* Pet. App. 132a. It simply held that Tropp's claims did not constitute the type of "wrong years" defense cognizable as *manifest error* and as such did not "lie against Lloyd's" in its collection action, but rather must be raised in counterclaim. *Id.* 132a-133a. And when Tropp raised these claims in counterclaim, the court did not hold that they were barred by the prior decision Lloyd's cites, or that they were meritless under principles of agency law. The appellate court

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[6] Respondent's further claim that it was an unbiased adjudicator of Tropp's liability to Lloyd's is frivolous. Lloyd's assessed the Equitas premium, then purchased (for pennies on the dollar) the right to collect it, keeping whatever it collected for itself (rather than for Equitas's reserves to protect policy holders). Pet. 10.

held that they were barred by Lloyd's' immunity. Pet. App. 62a-63a, 69a-72a.

Second, Lloyd's suggests that the U.K. court held that Tropp's missing assets claims were meritless because any failure to account for them was the result of his own, or his agents', failures rather than Lloyd's'. BIO 12. But the passages Lloyd's cites simply recite *Lloyds' allegations* and do not represent the court's own findings. *See* Pet. App. 134a, 135a.

Third, Lloyd's assertion that Tropp raises claims of misconduct only against his agents, and not against Lloyd's itself, *see* BIO 9-11 & n.12, is demonstrably false. Tropp sued Lloyd's for its own unlawful actions, including conduct that had nothing to do with his agents (*e.g.*, Lloyd's failure to credit him for funds it ordered his agents to hand over). Pet. 8-9, 38. If Tropp did not in fact owe Lloyd's the money it claimed, he had no obligation to pay it, even if he could have passed on the cost of Lloyd's wrongful judgment to someone else (at great risk and expense to himself). *See also* Pet. 38-39 (explaining practical futility of suing agents).

* * * * *

The Second Circuit did not consider any of Lloyd's' alternative defenses because it concluded that it was enough that the judgment was rendered by a U.K. court. But the Due Process Clause requires Lloyd's to demonstrate (not simply allege), and a U.S. court to find (not simply assume), that Tropp was afforded basic due process abroad.

II. The Second Circuit's Forum Selection Clause Ruling Warrants Review.

Lloyd's does not deny that circuits disagree over the standard for refusing to defer to a foreign tribunal because of limitations on remedies in that forum. *See* Pet. 35-37. Instead, Lloyd's points out that this Court has previously denied certiorari in cases involving Lloyd's' forum selection clause, BIO 13, and offers alternative grounds for affirmance, *id.* 14-16.

The Court's denial of certiorari in prior cases is irrelevant. Until proven false by Tropp's exhaustion of U.K. remedies in this case, Lloyd's' claim that remedies were available in post-deprivation counterclaim remained untested.[7] Moreover, in all the prior cases, the plaintiffs' claims alleged securities fraud, for which there is an arguable remedy in U.K. law given the fraud exception to Lloyd's immunity. Tropp, however, challenged unlawful conduct that did not involve fraud (*e.g.*, failure to credit missing assets and violation of the terms of his original contract with Lloyd's) for which there is no arguable U.K. remedy. Accordingly, the forum selection question that was poorly presented in

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[7] *See* Pet. 13-14. Lloyd's' attempt (BIO 3 n 3) to explain away its false representations to U.S. courts fails. *Compare, e.g., Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995) (noting that the "affidavit of Barrister John Lewis Powell shows that '[o]ne of the remedies under English law for misrepresentation (whether innocent, negligent or fraudulent) is rescission'" *with* Pet. App. 85a (U.K. court holding rescission unavailable as a matter of law).

the prior cases is squarely presented here. *See* Pet. 37-38.

Lloyd's' assertion of numerous alternative defenses to Tropp's accounting claim also provides no reason to deny review. This Court would never decide a forum selection question if it waited for a case in which the defendant disavowed having any other defense. Moreover, Lloyd's defenses were never raised below and are meritless. Having insisted to American courts that Names litigate their claims in England, Lloyd's is estopped from complaining that Tropp attempted to exhaust his claims in the U.K. before suing here.[8] Moreover, if the Court were to determine that it was fundamentally unfair to require petitioner to litigate his claims against Lloyd's in the U.K., it necessarily follows that Lloyd's' prior judgment under the U.K. system could not bar litigation of the claims here. *Contra* BIO 15. Nor does Lloyd's cite any choice-of-law authority that would require courts in this country to apply the very limitations on remedies that rendered the U.K. forum fundamentally unfair. *Contra id.*

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[8] *See, e.g., Mars v. Diocese of Rochester*, 763 N.Y.S.2d 885, 888 (2003) (New York recognizes doctrine of equitable estoppel); *cf. also In re Patry*, 691 N.Y.S. 2d 611, 613 (1999) (limitation period tolled during exhaustion of mandatory arbitration).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[9]

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June 7, 2011

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[9] Although petitioner provided an electronic version of the petition to the Solicitor General of New York when the petition was filed, to his knowledge, no court has certified to the State Attorney General the fact that the constitutionality of New York's recognition act has been drawn into question by this litigation. Because 28 U.S.C. § 2403(b) may apply, copies of the petition and this reply brief have been served on the State. *See* S.Ct. R. 29.4(c).

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(4)

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No. 10-1249

IN THE

Supreme Court of the United States

RICHARD A. TROPP, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

CORPORATION OF LLOYD'S ALSO KNOWN AS THE SOCIETY OF LLOYD'S,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF AMERICAN NAMES ASSOCIATION IN SUPPORT OF PETITIONER RICHARD A. TROPP

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U.S. Const. amend. V .....*passim*

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BRIEF *AMICUS CURIAE* OF AMERICAN NAMES ASSOCIATION IN SUPPORT OF PETITIONER RICHARD A. TROPP

INTEREST OF *AMICI CURIAE*

American Names Association is a national, professional organization whose mission is to educate the public, legislators and the courts on the Lloyd's crisis and to assist American investors in Lloyd's ("Names").[1] At its peak, the ANA membership was

[1] The letters of consent have been lodged with the Clerk of the Court by both petitioner and respondent. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than ANA and Law Offices of Greg J. Ryan, who authored this brief pro bono, made any monetary contribution to the preparation or submission of this brief.

approximately 1,000 of the approximately 3,000 Names in the Unites States. The resolution of the issue presented in this case is of great importance to ANA and its members who remain exposed to Lloyd's efforts to collect on its English Judgments.

The Law Offices of Greg J. Ryan represented 17 California Names in a recognition action filed by Lloyd's in the United States District Court for the Southern District of California, *Soc'y of Lloyd's v. Blackwell*, 127 Fed. Appx 961 (9th Cir. 2005). Greg J. Ryan, Esq. is admitted to practice before the United States Supreme Court. Mr. Ryan has prepared this brief pro bono on behalf of himself and the ANA. The California Names represented by this firm were, for the most part, not sophisticated investors. Many of them had already sold off their property to pay Lloyd's and were facing the loss of their homes and ability to afford health care. It is no exaggeration to say that the loss of funds to Lloyd's left many Names destitute.

SUMMARY OF ARGUMENT

The story of the crisis at Lloyd's and the response thereto is a complicated one. But the issue before the Court is a narrow one: Is the Uniform Foreign Money Judgments Recognition Act, as applied by New York and other jurisdictions, compatible with the requirements of the Due Process Clause? The case before the Court is compelling and involves fundamental public policy issues affecting American citizens.

The English money judgment in this case arose out of the most catastrophic insurance loss in history and is the result of a well-documented but unlitigated fraud scheme by Lloyd's. American Names, including Mr. Tropp, were recruited as investors by agents of

Lloyd's as a part of a massive recruitment campaign in the 1970's and 1980's with assurances that Lloyd's was a sound and conservative investment. What Lloyd's knew but the Names were deliberately *not* told was that they were assuming unlimited liability for guaranteed losses because by the time they joined Lloyd's, it was facing devastating and unquantifiable losses due to broadly worded comprehensive liability policies written decades earlier. Without their knowledge, Lloyd's placed American Names in syndicates that it knew, in time, would face tens of thousands of claims due to asbestos contamination. By departing from centuries of tradition and recruiting American Names and others in an effort to dilute liability for asbestos losses, Lloyd's was able to stave off disaster for more than a decade. But when the losses exploded publicly in 1991, the American Names were among those who faced personal financial ruin.

Although the American Names have a compelling fraud defense, they have never been able to assert it, in spite of the fact that judgments have been entered against them by English courts and Lloyd's now seeks to collect on those judgments in this country. That is in large part because no remedy existed under English law for Lloyd's fraudulent failure to disclose material facts to Names. In a series of decisions, the English Courts ruled that Lloyd's owed no duty to the Names to regulate the business of insurance at Lloyd's lawfully or in good faith or with reasonable care or diligence. The English Courts reaffirmed that, under English law, Lloyd's owed no duty in tort to make disclosure of material information to Names.

The Uniform Foreign Money Judgments Recognition Act permits a court to enforce the English

judgments only if they were obtained in accordance with due process and public policy – that is, only if there really was a meaningful opportunity to be heard and the judgments are not contrary to fundamental public policy. Treating the Name's allegations that they were fraudulently induced into investing in Lloyd's as an irrelevancy, English courts bound American Names to an unconscionable contract, precluded them from raising any affirmative defenses, and prevented them from discovering or presenting any evidence to challenge the existence or amount of their alleged liability.

With their English judgments in hand, Lloyd's initiated a wave of litigation in United States courts for recognition and enforcement of the judgments. But even this litigation offered Names no chance to litigate the merits of their fraud claims against Lloyd's. As noted by the District Court in this case, the Names were singularly unsuccessful in decisions by courts across the country. The fulcrum for these decisions was the "system-level" analysis under the UFMJRA, which is to say that there was no analysis of the fairness of the procedures applied in particular cases – it was only noted that the judgments were obtained under the English system and therefore, were presumed to be fair. *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000).

When it comes to Lloyd's and what happened to the Names in the U.K., the "system" was anything but fair. It is respectfully submitted that this Court should grant Mr. Tropp's petition for a writ of certiorari.

ARGUMENT

I. Due Process Requires U.S. Courts To Examine What Actually Happened In England and Not Just Presume The English System Afforded Due Process

The English proceeding, based on the "pay now sue later" and "conclusive evidence" clauses, was essentially one of "summary prejudgment." *Fuentes v. Shevin*, 407 U.S. 67, 72 n.5 (1972). Upon receiving the complaint, the Names were to submit their property to Lloyd's without any chance before judgment – indeed before a separate protracted and expensive proceeding – to litigate their defense of fraud. And because of the "conclusive evidence" clause, the Names were not apprised of the basis for calculation of the amounts claimed, nor where they permitted to inquire into that basis. Absent some "extraordinary" situation, however, the "root requirement" of procedural due process is that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Id.* at 82, quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971); *U.S. v. James Daniel Good Realty*, 510 U.S. 43 (1993); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Connecticut v. Doehr*, 501 U.S. 1 (1991). And the reason is plain:

> The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party.

Fuentes, 407 U.S. at 81 (1972). It is thus well-established that, save in "extraordinary situations," *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969), Tropp's rights to due process entail "an opportunity to be heard 'at a meaningful time and in a meaningful manner." *Fuentes*, 407 U.S. 67 (1972). What Names received in England, however, contained none of the reality, and scarcely the hint of even the appearance, of such meaningful right to be heard.

In the case at bar, the cumulative effect of Clauses 5.5 and 5.10 of the Equitas Contract is that the Names cannot have a hearing on the merits of their defense, cannot have discovery as to the amount claimed and cannot even challenge the opposing party's calculation of the amount due. Clause 5.10 alters the usual evidentiary rules to provide, in effect, that only Lloyd's may introduce evidence. The effect of all this is to turn the court into a rubber stamp. In short, there is no meaningful pre-deprivation hearing under the Lloyd's Equitas scheme, either before or after judgment.

The Names were not provided with a meaningful opportunity to raise their defenses to payment of the Equitas premium. The Names were merely allowed to litigate whether they had the right to raise such defenses before a judgment was entered. In reality, the only thing litigated in England was whether the Names would be denied their right to assert their affirmative defenses. Because the English court precluded such defenses, the merits of the Names fraud defenses were never litigated. For Lloyd's, it was like shooting fish in a barrel.

Until Names are given a meaningful opportunity to evaluate the amount of the claims against them and

to contest the validity of the claims of the grounds of fraud, it is clear that enforcement by U.S. Courts of the foreign judgments at Lloyd's behest would ratify the violation of well-established norms of due process of law by which Lloyd's obtained the judgments. *James Daniel Good Realty, supra; Fuentes, supra; Sniadach, supra; Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The general rule that state processes may not be deployed to take property before a hearing is made available to determine the would-be taker's right is not absolute. Where the taker's interests are great, and those of the person whose property is in jeopardy are slight, pre-hearing deprivation may be permissible provided the risk of error is small, post-deprivation hearing is expeditious and sure, recompense is available if there is error. *Mathews v. Eldridge, supra; U.S. v. James Daniel Good Realty, supra.* The balance in this test and in this case is overwhelmingly in Tropp's favor.

First and foremost, the Names' interests are in their property, which may be subject to levy and execution if the Lloyd's judgment is recognized and enforced. This is no small interest, as the amount of the Lloyd's judgment represents a multiple of Tropp's entire net worth. Second, Names have a valid and judicially cognizable interest in an accurate and complete report of Lloyd's claims, including an understanding of the reasons for the enormous losses. Lloyd's never has been willing to provide Names with this information. It can be obtained only through the power of the courts. Third, Names have an interest in a fair and complete adjudication of their claims that Lloyd's committed fraud against them.

Separately and collectively, these interests are grave indeed.

Lloyd's attempts to align its interests in pre-hearing deprivation with the interests of its former policyholders. But Equitas has already been fully funded, and Lloyd's is suing the Names as Equitas' assignee, for its own account. It is to Equitas that relevant policyholders must now look, not to Lloyd's. Equitas already has all the funds it required as a condition of entering into the Equitas Reinsurance Contract. There is thus no reason for imposing a "pay now, sue later" and "conclusive evidence" regime on the Names except to deliver an overwhelming strategic advantage to Lloyd's in litigation, enabling it effectively to escape scrutiny, and ultimately liability, for any fraud committed against the Names in the course of their disastrous relationship with Lloyd's.

Lloyd's has implied that Names have available to them a separate action in England for fraud through which they could recover their property even if it is taken before determination of the fraud question. But pre-hearing deprivations are permitted only in situations of exigence. *See, e.g., James Daniel Good Realty, supra.* Lloyd's neither pleaded, nor did the English courts hold, that the circumstances were so exigent that a pre-hearing deprivation of property could be justified.

Lloyd's contention that the Names are free to litigate their claims against it in a separate, subsequent proceeding after they have paid the Equitas judgment is fictive for 2 reasons: For many Names, such as Tropp, the resources to undertake such a separate suit after they have been financially devastated by paying out the funds demanded in this

action, is illusory. Second, under English law, there is no effective remedy against Lloyd's for fraudulent non-disclosure because English law does not recognize Lloyd's duty to disclose material facts of which Lloyd's had exclusive knowledge. *Soc'y of Lloyd's v. Jaffray*, 2000 WL 1629463 (Queen's Bench Division (Comm. Court), Nov. 3, 2000) (Creswell, J). *Aff'd* (2002) 146 S.J.L.B. 214 (AC) *available at* 2002 WL 1654876.

Under English law, Lloyd's liability would be based on the principle of *caveat emptor* and thus, no consideration would be given by the English courts to the Names' allegations that Lloyd's breached any duty to disclose material facts to the Names. *Jaffray* 21-25.

The risk of error is enormous where, as the court in England freely acknowledged, when discussing the "conclusive evidence" clause that Lloyd's records and calculation are to be conclusive evidence (that is to say the only evidence) unless there is a manifest error on the face of those records. And refusing to require disclosure of the records by Lloyd's to the defendants, the court held that it is for the name to identify and demonstrate some clear error. *Soc'y of Lloyd's v. Fraser*, [1998] C.L.C. 1630 (C.A.) *available at* 1998 WL 1043675.

It is hard to imagine a better prescription for error than to allow only one side to introduce evidence and to deny the other side discovery with respect to it. The balance of interests then is fairly simple to state: the financial ruin of individuals, with all the attendant horrible consequences for family members and persons who may be dependent upon them, as against the speedy provision of funds to a corporation

that has neither pleaded nor presented exigent circumstances.

II. THE LLOYD'S JUDGMENTS ARE REPUGNANT TO U.S. SECURITIES LAWS

It is beyond question that the U.S. Securities Law expresses the fundamental public policy of the United States. The protection of unwary investors from being duped by unscrupulous sellers of securities is an exigency of the utmost priority in contemporary society. The central objective of the securities laws is to protect the public against unlawful and fraudulent investment schemes and to promote full disclosure of all information that is necessary to make an investment.

This Court has repeatedly explained that the U.S. securities laws were intended to remedy the deficiencies of the common law. For example, the Court stated in *Herman and MacLean v. Huddleston*, 459 U.S. 375 (1983) at 388-89:

> "[T]he typical fact situation in which the **classic tort of misrepresentation and deceit evolved was light years from the world of commercial transactions to which Rule 10b-5 is applicable.** Moreover, **the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud. Indeed, an important purpose of the federal securities statutes was** to rectify perceived deficiencies in the available common law protections by **establishing higher standards of conduct** in the securities industry."

In *Securities & Exchange Commission v. Capital Gains Research Bureau, Inc.* 375 U.S. 180 (1963) the Court stated, at 188:

> "The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's. It was preceded by the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, and the Investment Company Act of 1940. **A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor** and thus to achieve a high standard of business ethics in the securities industry."

The *Jaffray* case shows that the English law applied to Names was indeed "light years" from the policies embodied in the U.S. securities law. For example, the definition of "fraud" applied by the *Jaffray* court was one that excluded from the definition the withholding of material facts from the Names. According to the *Jaffray* decision, the only way the Names could prove "fraud" as so defined, was to show knowing or reckless falsehood. The *Jaffray* court held that "mere omissions are not sufficient." (at ¶ 29) Furthermore, even when the *Jaffray* court found as a fact that it had been falsely represented to prospective Names "that there was in place a rigorous system of auditing," the court concluded that the Names were not entitled to any relief, because "the Names had however failed to prove that Lloyd's did not believe the representations to be true or that they even knew that they were or became untrue or were reckless as to whether they were true or untrue." (¶ 587 vi) The English court applied a common law standard closely akin to the doctrine of

caveat emptor, which was and is completely foreign to the policies of U.S. securities laws.

Lloyd's led the U.S. courts to believe that the remedies in England would vindicate the Names' substantive rights and would not subvert the policies of federal and state securities' law of insuring "full and fair disclosures" by issuers. *Bonny v. Society of Lloyd's*, 3 F.3d 156 at 161 (7th Cir. 1993), had held that "remedies in England vindicate plaintiffs' substantive rights while not subverting the United States' policies of insuring full and fair disclosures by issuers and deterring the exploitation of U.S. investors"; and *Roby v. Corporation of Lloyd's*, 996 F2d. 1353, at 1364 (2nd Cir. 1993) had held: "the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors."

It is clear from these opinions that the courts were convinced by Lloyd's that in England, American investors would not be deprived of the ability to obtain redress for material non-disclosures or for having been fraudulently induced to invest in Lloyd's.

That representations of Lloyd's were untrue has now been established by a number of sources, including the case of *Society of Lloyd's v. Jaffray*, Queens Bench Division (Commercial Court), November 3, 2000, affirmed by Court of Appeal on July 26, 2002.

The *Jaffray* decision reveals that contrary to the representation by Lloyd's to the U.S. courts, the Names had: (a) no remedy under English law for Lloyd's failure to disclose material facts to the Names being recruited to unknowingly assume massive underwriting liabilities previously incurred; (b) no remedy of rescission; (c) no remedy for negligent mis-

representation; and most critically, (d) no remedy that fulfilled the policy of the United States securities laws.

Some of the portions of *Jaffray* that contradict Lloyd's representations to U.S. courts are set out below:

> "28. It is no doubt because of the decisions and reasoning in some of these cases that we are not concerned with a case which alleges that Lloyd's are liable to the Names because of a breach of contract. **Nor are we concerned with the breach of an alleged duty of care, whether committed in bad faith or otherwise. In particular, we are not concerned with a case based upon the allegation that Lloyd's fraudulently failed to disclose material facts to prospective Names. Any such case is not within the threshold fraud issue.**
>
> "29. This is important because a significant amount of the argument of the litigants in person, and particularly Sir William Jaffray, sought to advance just such a case. For example, **It was said that** Lloyd's motto is "Fidentia" that **Lloyd's owed the Names a duty of the utmost good faith and that Lloyd's was in breach of that duty in that it fraudulently failed to give information to prospective Names as to the risks associated with asbestos related claims because it knew that, if it did, prospective Names would be put off.** Submissions along these lines were advanced with great vigor and conviction, but **they cannot assist the Names in this appeal because in order to establish the tort of deceit the Names must establish relevant**

fraudulent misrepresentations. ***Mere omissions are not sufficient.***"

"398 . . . . **We're of the strong view that the decision not to refer to asbestosis at the Rota meetings was misguided, and so misguided as to have given rise to suspicion as well as resentment in many names. But it does not follow that the decision was dishonest nor does it necessarily lead to the conclusion that Lloyd's was guilty of any dishonest representation.**"

"454. **It is clear that** during **this period Lloyd's was encouraging new membership.** At a Council Meeting of **13 May 1985, the new Chairman Mr. Peter Miller referred to a paper to be circulated to Chairs 'indicating the line which would be taken . . .** in forthcoming speeches which will encourage applications for membership . . . **This will take account of the need for increased membership as a result of a shortage of capacity** and the conflicting adverse publicity arising from **reported underwriting losses for recent years.' On July 5, 1985, Sir Peter Green wrote his 'fishing trip letter'** quoted at paragraph 233 above. The letter is much relied by the names because of its reference to the 'overpayment of past profits is falling for recoupment from a far larger number of current names' and the reference to it being critical if old names were to resign or new names would not join. But **the letter also reflects** the difficulty with the Revenue and states that **'there are plenty of horrors in the pipeline** and they must be reserved for even if the figures are not available.

The "true and fair" requirement should assist in this."

"477. We **have great anxiety about the fact that names continued to join Lloyd's and be placed on syndicates which were infected by the long-tail liabilities, where the premium received for the outstanding liabilities was in the event massively too little.** The risk of that premium being inadequate must on any view have been increasing during this period, and **we see no sign of anyone at the centre contemplating that a warning of the increased risk should be given (for instance, at Rota) to names, and particularly new names.** The attitude was that it should be left to members' agents. Relevant documents such as Sir Peter Green's fishing trip letter did not focus on the position of new names, (in the sense of future names) at all. So far as persons at the centre were concerned, they were faced with the following facts: **profits had been distributed in the 1950's and 1960's and it was people who had become members since those days who were going to have to pay the losses;**

"587. As to the appeal on the grounds for which permission has been given, **our conclusions may be summarised as follows:**

i. **There was representation in the 1981 brochure that there was in place a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses.** (Paragraph 321)

ii. **Subsequent brochures contained essentially the same representation, even though the word 'rigorous' no longer appeared.** (Paragraph 323)

iii. The 1981 brochure also contained a representation that Lloyd's believed that such a system was in place. So did subsequent brochures. (Paragraphs 321 and 323).

iv. The globals contained no relevant representations. ((Paragraphs 326 and 343).

v. **The representations in (i) and (ii) were during the relevant period, untrue.** (Paragraphs 375 and 376).

vi. **The Names have however failed to prove that Lloyd's did not believe the representations to be true or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue.** (Section VII).

vii. **It follows that the judge was right to determine the threshold fraud issue in favour of Lloyd's** and to hold that Lloyd's is not liable to the Names in the tort of deceit. It further follows that the appeal on the merits, which the Names had permission to bring, fails and must be dismissed.

In 1997, the English Court held in *Soc'y of Lloyd's v. Lyon, Leighs & Wilkinson* CLC 1398 (1997) *available at* 1997 WL 1104500 that the Names were not entitled to litigate claims of fraud in the inducement of their membership or underwriting at Lloyd's as

a set-off to their obligations to pay the Equitas premium.

There was a huge gulf between what Lloyd's told the U.S. Courts and the harsh truth about the lack of remedies the Names had against Lloyd's in England. The U.S. Courts assumed, in the absence of evidence otherwise, that the Names would have adequate safeguards and remedies. More particularly, the U.S. court could not have anticipated that the Names would be deprived of their day in court on their fraud claims because the Equitas contract was not even in issue. It was not until it was free of the U.S. courts, that Lloyd's divulged the terms of the Equitas contract and thus revealed previously undisclosed limitations on the Names' ability to pursue their defenses including: (a) the "conclusive evidence" clause of the Equitas contract which prevented American Names from challenging the computations of the Names' liability for the Equitas premium (which is the basis for the present judgment) – decisions of the English courts found as a fact that they contained errors and were unreliable, *see Society of Lloyd's v. Fraser*, [1998] C.L.C. 1630 (C.A.) *supra* and (b) the "pay now, sue later" clause of the Equitas contract which Lloyd's used to prevent these Names and others from raising Lloyd's fraud as a set-off or defense to Lloyd's claims.

The Names do not claim that the entire English legal system is lacking in due process and inadequate, but they do assert that in the instance of the American Names, and when it comes to Lloyd's, the English system is anything <u>but</u> fair or impartial. Lloyd's misrepresented the law of England, and while it was assuring U.S. Courts that the Names would have effective remedies in England, Lloyd's was

secretly taking steps to further deprive the American Names, including Mr. Tropp, of due process in the English legal system. The judgments were imposed without adequate safeguards and protections of the Names against fraud and misrepresentation in the sale of securities. All of this was in contradiction to the Lloyd's representations to the American courts that American Names would be provided with full due process, adequate remedies at law and in equity, and with *remedies that would fulfill the policies of the American securities laws.*

Names are not seeking to "relitigate" defenses they raised and lost in England. To the contrary, the Names are asking the Court not to enforce the English judgments precisely because they were not permitted to litigate their fraud defenses at all. The Names were not allowed to litigate Lloyd's fraud in inducing their investment and participation as Names. The Names were not allowed to litigate Lloyd's and AUA9's breaches of fiduciary duty in binding them to the Equitas contract. The Names were not allowed to obtain discovery, or to refute in any way, the basis of their alleged liability for insurance losses, the amount of such losses, or the method of calculating such losses. Moreover, under English law, fraudulent non-disclosure by Lloyd's is not an actionable wrong and there was not consideration given, nor could there have been consideration given, by the English courts to the Names allegation that Lloyd's breached a duty to disclose material facts to the Names. *Jaffray* ¶ 21-25.

CONCLUSION

In an enforcement proceeding, the U.S. Courts do not act as mere implementers of an earlier foreign decision. For sound policy reasons, a degree of defer-

ence is given to a foreign decision. *Hilton v. Guyot*, 159 U.S. 113, 16 S.C. 139 (1895). But that deference is in no sense dictated by legal compulsion. It has always been recognized as grounded in a choice that is made by the adjudicating jurisdiction. That is why states provide for non-recognition of foreign judgments in appropriate cases. England may be content, at least where Lloyd's of London is concerned, with the deprivation of English property without any effective ability of the property-holder to interpose relevant defenses before that property is taken. But the property here sought resides in the United States, not in England. It would be an affront to the most cherished ideals of American law – and a violation of explicit U.S. law – if that property should be surrendered before there has been a thorough airing of the Names' side of the case.

On this petition, Tropp faces the prospect that he will have gone to the U.S. Courts, then to the English Courts, and then back to the U.S. Courts without ever having a determination on the merits of his claim that Lloyd's deliberately misled him into investing in Lloyd's. For all of these reasons, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

RICHARD A. TROPP,
ON BEHALF OF HIMSELF AND ALL OTHERS
SIMILARLY SITUATED,

Petitioner,

v.

CORPORATION OF LLOYD'S,
ALSO KNOWN AS THE SOCIETY OF LLOYD'S,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF GEOFFREY C. HAZARD, JR. AND MICHAEL TRAYNOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondents received timely notice of amici's intent to file this brief and have consented to its filing.

SUMMARY OF ARGUMENT

This case presents opportunity to clarify an important question in recognition of foreign judgments: Is it sufficient that the court rendering the judgment (here, that of the United Kingdom) provides "system fairness," where in the specific case the foreign court did not address the merits but deferred to a decision by an intensely interested party?

In the leading case involving the recognition of foreign judgments, *Hilton v. Guyot,* 159 U.S. 113 (1895), the Court referred to the general principle that the foreign judgment must have been rendered "under a system of jurisprudence likely to secure an impartial administration of justice," *id.* at 202. The Uniform Foreign Money-Judgments Recognition Act (1962), subsequently adopted by many States, has been interpreted as requiring only system fairness but not fairness in the specific case. The "system fairness" standard permits enforcement in the U.S. of a judgment that clearly violates "specific case" fairness. Many Americans today are exposed to litigation in other countries, after which enforcement of a foreign judgment is sought in this country, as was Mr. Tropp and hundreds of other Lloyd's "Names."

The Court should hold that a foreign court's "system fairness" is insufficient Due Process protection of a specific "person," which is the requirement of the Fifth and Fourteenth Amendments. Where a person has been denied opportunity to contest the merits before an impartial decision-maker, the principle in *Tumey v. Ohio*, 273

U.S. 510 (1927) and subsequent decisions, precludes enforcement of the resulting judgment. Petitioner was denied Due Process in the courts below, by their recognition here of a United Kingdom judgment that simply accepted the legal and factual merits of Lloyd's decision.

ARGUMENT

I. Background

Petitioner Rick Tropp invested as a "Name" in Lloyd's and agreed to choice of forum and choice of law clauses, giving the UK courts exclusive jurisdiction. Tropp demanded that he *not* be included in Lloyd's syndicates insuring against environmental liability. Lloyd's' agents nevertheless put him in numerous environmental liability syndicates and refused to permit him to resign. The environmental liability claims burgeoned, notably including huge asbestos losses.

To cope with these unsustainable losses, Lloyd's put together a "Reconstruction and Renewal" plan and created a new entity, "Equitas," to which it consigned thousands of Names, including Mr. Tropp and many other Americans. Under the "R&R" these Names were made obligors on *previously* accrued environmental claims. Mr. Tropp was assigned to this liability through an agent appointed by Lloyd's and identified as "AUA9". The R&R plan also required all such Names, by contract imposed on them, to "pay now, sue later," (*i.e.*, pay losses and then only dispute their liability). The R&R contract in addition had a "conclusive evidence" clause under which a Lloyd's entity ("Members Service Unit") made calculations of

Names' liability that were "conclusive evidence as between the Names and Equitas, in the absence of manifest error." ("Manifest error" included evident error in arithmetic, but not underlying tort or breach of contract claims.)

The sweeping character of Lloyd's' ensuing actions is summarized by Professor Courtland Peterson, a scholar in this area of the law, as follows: ". . . Lloyd's then set about suing the non-accepting Names on these assigned claims. . . . The proceedings against the non-accepting Names on these assigned claims scarcely deserves the name of 'trial,' because of several extraordinary clauses in the Equitas contracts" (referring to the "pay not, sue later" and "conclusive evidence" clauses). Courtland H. Peterson, *Limits on the Enforcement of Foreign Country Judgments and Choice of Law and Forum Clauses*, in James A. R. Nafziger & Symeon C. Symeonides eds., Law and Justice in a Multistate World: Essays in Honor of Arthur T. Von Mehren 173, 181 (2002). *See also* his earlier article, Courtland H. Peterson, *Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases*, 60 La. L. Rev. 1259 (2000).

Lloyd's has sued many of the Names, including Mr. Tropp. Most Names simply folded and have been pursued for millions of dollars by Lloyd's in this country. Mr. Tropp tried to defend the Lloyd's UK suit against him, mindful that otherwise he would be held to have forfeited that opportunity. However, his defenses were denied as being beyond consideration by the UK Court. Mr. Tropp's request for leave to appeal was similarly denied. He then tried

unsuccessfully to sue Lloyd's in the UK. That attempt was also rejected in deference to Lloyd's.

Mr. Tropp then brought this declaratory judgment proceeding in the Southern District of New York, asserting that the UK judgment was not valid because it was based on unilateral Lloyd's determinations that the UK courts regarded as beyond their examination. The District Court held that because UK courts exhibited "system fairness," the UK judgment is entitled to enforcement here, even if in his specific case Mr. Tropp was not afforded opportunity to defend on the merits.

The Second Circuit refused to accept that *Tumey v. Ohio,* 273 U.S. 510 (1927), applies, on the ground that "Tropp is not facing criminal charges, but rather a civil judgment for breach of contract," and that the "UK courts themselves had no financial interest in the outcome of Tropp's case." It is of course true that this is a civil case, not a criminal one, and that the UK courts had no financial interest in the outcome. It is also true, however, that the decision in *Tumey* itself relied on civil cases, and that its principle has subsequently been applied in civil cases. It is also true that Lloyd's, whose decision was given "*conclusive*" deference by the UK courts, had a very substantial "financial interest in the outcome."

The UK courts' refusal to provide any meaningful avenue to challenge Lloyd's' assertion of liability effectively rendered Lloyd's the sole determiner of its entitlements. Accordingly, the UK courts also violated the companion principle that courts must provide a reasonable opportunity to be heard, as the Petition urges (pp. 29-32).

II. *Hilton v. Guyot* and Judgment Recognition

Hilton v. Guyot, 159 U.S. 113 (1895), held that, under principles of comity, a foreign country judgment should be recognized in this country where it resulted from a reasonably fair judicial procedure and the foreign country provides reciprocal recognition. The Court did not have to decide, nor did it decide, the standard for determining whether the rendering court's judicial procedure was fair or whether core principles of due process including an impartial tribunal and a reasonable opportunity to be heard were required in each case in addition to a requirement for overall "system fairness." It did hold that the fact that "one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party," under a procedure "according to the laws of France," was not "a sufficient ground for impeaching the foreign judgment." *Id.* at 204-205. (Under civil law procedure the court conducts cross examination.) Thus, the Court rendered a holding on an evidentiary issue at the margins of due process but left undeveloped the core due process principle of impartiality that it later reached, in the domestic context, in *Tumey v. Ohio*. The instant case affords an opportunity to articulate and apply the *Tumey* principle to foreign judgments. The result thus will be two clear and necessary "bookends" in this important area of the law, one in *Hilton* itself marking what is not required at the margins of due process, the other, in this case, marking what is required at the core.

Subsequently to *Hilton*, the Commission on Uniform State Laws promulgated the Uniform Foreign Money-Judgments Recognition Act (1962),

which has since been adopted in many States; more recently, fifteen states have adopted the 2005 version of that Act. In assessing whether a foreign judgment was based on a fair procedure, there have been two concepts: "System fairness," meaning that the foreign court system is generally fair, and "specific fairness," referring to whether there was reasonably fair judicial procedure in the specific case. A number of courts, including the courts below in this case, have applied the "system fairness" standard. *See, e.g., CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 160 (N.Y. 2003) ("the relevant inquiry . . . is the overall fairness of England's 'legal system,' which is beyond dispute").

There has also been difference of opinion whether the rules governing recognition are State law or federal—the *Erie* problem. In this case no resolution of that issue is required. The Fifth and Fourteenth Amendments both require fair procedure as a basis of recognition of a judgment. The UK special procedure for Lloyd's disputes was not fair because it accorded Lloyd's the right unilaterally to determine its rights and duties with respect to "Names" and failed to provide for any adequate judicial review. The question, therefore, is one of Constitutional law concerning enforcement here of a foreign judgment. The issue is governed by the rule of Due Process in the Fifth Amendment or its counterpart in the Fourteenth Amendment.

III. The UK Procedure Was Fundamentally Unfair.

The concept of "reasonably fair judicial procedure" is expressed in various ways, including

Due Process and "first principles of justice." In general terms, fair procedure includes reasonable notice, opportunity to present evidence and argument, and determination by a neutral tribunal. *See, e.g.*, Principles 1, 5, and 30 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 17-18, 22-24, 48-49 (2006); American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, § 5, Reporters' Notes at 78 (2006) ("such basic principles as the court having judicial independence and impartiality, a right to the assistance of counsel of the party's choice, due notice and a right to be heard, and a fair opportunity and adequate time to present contentions and evidence." Soon after *Tumey* was decided, Justice Cardozo cited it, saying that "The guaranty of liberty in the constitutional law of the nation [requires that] . . . There must be judgment after notice and hearing. There must be trial by an impartial judge without interest in the event. . . ." Benjamin Nathan Cardozo, The Paradoxes of Legal Science (1928), in Margaret E. Hall Ed., Selected Writings of Benjamin Nathan Cardozo 327-328 (1947).

In whatever terminology the concept is expressed, the UK judgment did not afford fair procedure in this case, or in the hundreds of other claims by Lloyd's under its "R&R" arrangements. This blunt fact is shocking, given the generally fine reputation of the UK courts. But special legislation enacted to protect Lloyd's enabled it to shift mounting environmental losses from itself to newly enrolled "Names" without their consent and directly contrary to instructions not to invest in syndicates

involving environmental risks. As a result, the UK courts were precluded from affording "specific fairness," *i.e.* reasonably fair procedure to each Name, and Mr. Tropp was afforded only what Lloyd's considered was appropriate.

IV. Due Process in U.S. Courts

The Due Process requirement in the Fifth and Fourteenth Amendments refers specifically and individually to "any person." Accordingly, no court in the U.S. may enter or enforce a judgment resulting from a fundamentally unfair procedure. On the contrary, "specific fairness," not merely "system fairness," must be complied with. The leading U.S. authorities have dealt with specific defects in the rendering tribunals' procedure: *E.g., Pennoyer v. Neff*, 95 U.S. 714 (1877) (no adequate notice); *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987) (due process requirement applies to each individual defendant); *Tumey v. Ohio*, 273 U.S. 510 (1927) (trier of fact had financial interest in the outcome); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986) (judge personally involved in case presenting same legal issue as that before his court). The proceedings below open the way for the UK judgment for Lloyd's to be recognized and enforced against Mr. Tropp and the many other "Names" who were pushed into liability by the "R&R" that Lloyd's carried out.

When a court in the United States enforces a foreign judgment that does not comport with basic fairness, that court itself denies due process to the defendant. This case does not involve issues at the margins of due process, *see Hilton v. Guyot, supra.* It involves principles of basic fairness, including the

right to an impartial tribunal and a reasonable opportunity to be heard.

V. The Core Due Process Principle of An Impartial Tribunal: *Tumey v. Ohio*

In *Tumey v. Ohio*, 327 U.S. 510 (1927), the Court held that the defendant was denied due process when the initial and critical decision-maker, the village mayor, convicted him of an offense while at the same time garnering fees from the conviction.

The *Tumey* principle is fundamental. Contrary to the Second Circuit's thought that it is limited to criminal cases, the Court not only relied on civil cases, but in subsequent civil cases has cited *Tumey* as controlling authority.

In *Tumey*, the Court set forth the English and U.S. history for the "general rule" that "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided." 273 U.S., at 522. It cited various cases, including civil cases. *Id.*, at 522-531. To take just one, *Meyers v. Shields*, 61 Fed. 713, 725-731 (N.D. Ohio 1894), cited in *Tumey*, 273 U.S., at 528, held that a county auditor was disqualified "to make a valid assessment as the conclusion of the proceedings before him because of his direct pecuniary interest in the result . . . . [T]he auditor's compensation is directly dependent upon the finding he makes. . . . "[T]he proceedings . . . result in depriving the citizen of his property without due process of law, and are therefore invalid under the fourteenth amendment to the constitution of the United States." *Id.*, at 725, 726-727, 731.

In addition to relying on civil cases in *Tumey* itself, the Court has relied on *Tumey* as dispositive authority in subsequent civil cases. *E.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (actual influence of judge not required, only whether sitting on the case would offer a possible temptation to the average judge to lead him "not to hold the balance nice, clear and true"); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (administrative board with pecuniary interest could not preside over a hearing); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147-149 (1968) (supposedly neutral arbitrator who failed to disclose prior business relationship); *cf. Marshall v. Jerrico*, 446 U.S. 238, 248-249 (1980) (distinguishing an administrative prosecutor from an administrative law judge before whom, unlike here, an impartial *de novo* hearing was required after the prosecutor assessed a violation). For *Tumey's* continued critical importance in criminal cases, *see, e.g., Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (death penalty) (recognizing the right to an impartial adjudication as so basic to a fair trial that infraction can never be treated as harmless error); *Young v. United States ex rel. Vuitton et Fil S.A.*, 481 U.S. 787, 809-810 (1987) (contempt).

The Second Circuit rejected *Tumey* on the additional ground that Lloyd's self-interested determination was enforced by an impartial English court. Whether the enforcing court was "fair" or part of a generally "fair" system is not the point. The essential question is whether the fundamental decision-maker is impartial. For example, in *Tumey*,

the question was not whether the Ohio Court of Appeals or the Ohio Supreme Court was impartial but whether the mayor who convicted Tumey was impartial. Likewise, the question here is not whether the English court was impartial but whether Lloyd's and its captive entities were impartial. The underlying decision must be rendered by an impartial decision-maker. That decision-maker's pecuniary interest infects the entire case, notwithstanding the supposed impartiality of a reviewing or an enforcing court.

VI. The Due Process Limitation in Enforcement of Foreign Judgments

This case affords an important and useful opportunity to decide that a foreign judgment must satisfy an irreducible and core measure of individual due process beyond system fairness before it can be enforced in the United States. The Court should take the opportunity to make clear that, if a court in the United States gives legal effect to a foreign judgment that violates fundamental fairness, the enforcement of that U.S. judgment itself becomes a denial of due process. The core principle here is that the decision-maker must be impartial. It should be made clear under *Hilton v. Guyot* that this principle, which the Court has made clear for domestic judgments, also applies to foreign judgments. As a result of the current lack of clarity in basic constitutional principle, persons entitled to due process in the United States still risk enforcement of foreign judgments against them that fail to meet core principles such as impartiality, notice, and opportunity to be heard even if the foreign country in

which particular judgments are rendered generally maintains a fair "system."

The risk is amplified by the increasing globalization of litigation and aggressive assertion in some countries of subject matter and personal jurisdiction over U.S. defendants. The risk is aggravated by the confusion in the lower courts, federal and state, about the requisite basic and irreducible minimum of due process that must be achieved beyond "system fairness" before a foreign judgment will be enforced here. Although scholarly commentary and proposals such as those by the American Law Institute, *supra*, and the Uniform Law Commission in its recent Uniform Foreign-Country Money Judgments Recognition Act, §4(c)(8) (2005) (due process) provide some helpful guidance, they differ in their formulations, are not authoritative, and do not establish the clear constitutional marker that only this Court can establish. "System fairness" is not enough.

Suppose, for example, that a foreign court, in a country that qualifies for "system fairness" treatment, enforces a judgment of the critical decision-maker who was without question bribed. (It bears noting that in *Meyers v. Shields*, *supra,* which *Tumey* cited, the court described the auditor's fee as "not only in the nature of a bribe to decide against the citizen, but a corrupting inducement to make his finding the largest possible." 61 Fed., at 727.) Should a court in the United States hold that due process to the defendant "person" is satisfied because the foreign court acted in a generally fair system even though individual due process, at the core of *Tumey v. Ohio*, was without question denied? Such a

holding would undermine the principle of *Tumey v. Ohio* without advancing any legitimate interest of the United States or any foreign country. It would subvert the critical requirement of the Fifth and Fourteenth Amendments that courts, federal or state, accord due process to "any person" whose life, liberty, or property is at stake. Granting certiorari in this case will afford the Court an opportunity to make clear that U.S. persons are entitled to invoke the fundamental principle of *Tumey v. Ohio* against the enforcement of foreign judgments that violate that principle.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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BRIEF OF JEREMY MCBRIDE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

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[1] Pursuant to Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than the amicus or his counsel made a monetary contribution to the preparation or submission of this brief. The amicus acted for the petitioner before the European Court of Human Rights in a challenge to the denial of access to court by the United Kingdom through the protection extended to Lloyd's. This challenge was rejected on admissibility grounds. He has not acted for petitioner subsequent to that case. Counsel for petitioner and respondents received timely notice of amicus's intent to file this brief and have consented to its filing in letters on file with the Court.

SUMMARY OF ARGUMENT

The petition for certiorari addresses a serious problem affecting the accountability of the Society of Lloyd's ("Lloyd's") under English law. It concerns in particular the inability of persons to have claims with a clear foundation in law and fact that Lloyd's has breached obligations owed to them considered and determined by the English courts. Though this problem particularly affects the thousands of individuals and limited liability companies who join in groups to underwrite the insurance business ("Members"), it is a problem whose impact could be even more wide-ranging as the most recent generation of entities solicited by Lloyd's itself and its agents to join the Society as Members includes many fiduciary institutional investors.

Lloyd's is the beneficiary of a discrete legal system created especially for it by Parliamentary legislation and judicial decisions. That system effectively insulates Lloyd's from scrutiny and denies its individual Members due process. The problem of the non-availability of remedies for many arguable claims stems from the combination of the limited reviewability of the exercise of some of the extensive regulatory powers conferred on Lloyd's by the Lloyd's Act 1982 and the breadth of the interpretation given to an immunity which section 14(3) of that Act provides that Lloyd's should enjoy. The byelaws that Lloyd's is privileged to issue and which have the status of legislation are effectively not subject to judicial review. Though they are ostensibly subject to challenge as private laws, in practice that review has been limited by Lloyd's itself in the provisions included in the byelaws and by the extension of

public-function immunity to acts of Lloyd's that might more properly be construed as private regulatory functions.

A mandatory ground for refusing to recognize or enforce a foreign judgment is that it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." Mr. Tropp and those similarly situated to him were not permitted to bring an effective challenge in any kind of judicial forum against Lloyd's. The perhaps unintended interplay of Parliamentary action and judicial decision-making has worked to deny Members of Lloyd's any remedy whatsoever from the acts of a private corporation. This court should not permit the Second Circuit to compound this injustice by recognizing and enforcing the judgment resulting from a proceeding in which the defendant, Mr. Tropp, had no opportunity to challenge the validity of the substantial liability unilaterally imposed on him without his consent.

ARGUMENT

I. The Case Presents The Remarkable Instance Of A Foreign Legal System That Insulates A Private Company From Responsibility For Its Wrongful Acts.

The petition for certiorari addresses a serious problem affecting the accountability of the Society of Lloyd's ("Lloyd's") under English law. It concerns in particular the inability of persons to have claims with a clear foundation in law and fact ("arguable claims") that Lloyd's has breached obligations owed to them considered and determined by the English courts. This is a problem that particularly affects its Members, i.e., the thousands of individuals and limited liability companies - often referred to as "Names" - who join in groups ("syndicates") to underwrite the insurance business. However, it is a problem whose impact could be even more wide-ranging as the most recent generation of entities solicited by Lloyd's itself and its agents to join the Society as Members includes many fiduciary institutional investors, notably church and university endowments, other not-for-profit trusts and pension funds, as well as public corporations.

Petitioner in this case is a victim of a U.K. legal system that has evolved so as to prevent Lloyd's from being accountable for its actions. Individuals who are Members of Lloyd's have no way to protect themselves from decisions made by Lloyd's that adversely affect them or their property interests. Lloyd's is the beneficiary of a discrete legal system created especially for it by Parliamentary legislation and judicial decisions that effectively insulates

Lloyd's from scrutiny and denies its individual Members due process. The judicial decision at issue in this case is not entitled to recognition and enforcement under New York's Uniform Foreign Country Money Judgments Recognition Act. Indeed, a mandatory ground for non-recognition is that the judgment for which recognition is sought "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[2] New York's "system" approach requires recognition of a judgment such as this because of its focus solely on the legal system writ large – in this case the U.K. legal system. Yet the U.K. legal system here does not afford the plaintiffs in an entire sub-class of cases brought by Lloyd's Members, including the case brought by petitioner Tropp, any process whatsoever. Though it is quite clear the "due process" referred to in the Uniform Act does not require that a foreign legal system meet the idiosyncratic requirements of a particular U.S. state or country, the complete inability of Mr. Tropp to challenge acts ostensibly committed in his name and ostensibly conferring on him significant liability violates the international standard of due process incorporated by the Uniform Act.[3]

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[2] N.Y. C.P.L.R. § 5304(a)(1).

[3] *See, e.g.*, *Sanchez Osorio et al. v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1328 (S.D. Fla 2009) (*affirmed on other grounds*, 2011 U.S. App. LEXIS 6208 (11th Cir., Mar. 25, 2011) ("[S]tatutes that condition the payment of substantial sums on a set of facts which the defendant is unable to controvert are presumptively unfair.").

II. The Regulatory Powers Conferred On Lloyd's Of London By U.K. Law Combined With Expansive Immunity Means A Complete Absence Of Due Process For Individuals With Viable Claims Against The Company.

The problem of the non-availability of remedies for many arguable claims stems from the combination of the limited reviewability of the exercise of some of the extensive regulatory powers conferred on Lloyd's by the Lloyd's Act 1982 – particularly those involving the adoption of its private byelaws which have the same legislative authority as regulations made by the Government and its agencies – and the breadth of the interpretation given to an immunity which section 14(3) of that Act ("the 1982 Act") provides that Lloyd's should enjoy.

A. Lloyd's Is Treated As A Public Entity Immune From Liability For Its Exercise Of Regulatory Functions But Is Not Subject To The Administrative Review That Governs Public Bodies.

Under section 6(2)(a) of the 1982 Act, Lloyd's Council is empowered to make byelaws both for the furtherance of the objects of Lloyd's and for a number of purposes, including the regulation of the relations between Members and Lloyd's agents (*i.e.*, the persons who solicit persons to join Lloyd's, manage the recruitment process, and advise Members each year on the syndicates on which they should put their capital at risk each year). The object of this provision is to facilitate the self-regulation of that part of the

insurance market that is operated through Lloyd's. All byelaws made under this provision – not just those issued pursuant to the exercise of Lloyd's' regulatory public functions – have been treated as having the legal force of delegated legislation.[4] However, their adoption and use are not subject to review by the Administrative Court under public law standards concerning legality, rationality and procedural fairness ("judicial review") but only to challenge in the civil courts for breach of private law rights such as breach of contract or the commission of a tort ("private law remedies"). Furthermore the exercise of these powers is not governed by the Human Rights Act 1998, which requires public bodies to act compatibly with the rights and freedoms in the European Convention on Human Rights by, *inter alia*, according due process and respecting the right to property.

Section 14(3) of the 1982 Act provides that "the Society shall not be liable for damages whether for negligence or other tort, breach of duty or otherwise ...". This immunity was solely intended to protect the self-regulatory scheme underpinned by the 1982 Act – *i.e.*, the public law functions entrusted to Lloyd's – from inappropriate challenges in the courts. However, the English courts have treated it as covering matters that go well beyond the performance of any public regulatory function, thereby precluding review of action taken both by the Society and its management pursuant to their own,

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[4] *Arbuthnott & Ors v Fagan & Ors, Feltrim & Ors*, 23 May 1994, QB (Comm).

essentially commercial, private interests. This interpretation is particularly significant from an accountability perspective when there is no other way of challenging the impact of an exercise of the regulatory powers on an individual's rights.

The problem of the non-availability of remedies for many arguable claims as a result of these two provisions – which was not envisaged by those drafting and adopting the 1982 Act – emerged in the course of litigation following the adoption by Lloyd's of the Reconstruction and Renewal Byelaw 1995, designed to effect a financial restructuring. It is thus a problem that is particularly relevant to the current proceedings brought against the petitioner.

1. *Lloyd's Restructured Its Operations In A Manner Imposing Significant Liability On Petitioner And On Those Similarly Situated Without Their Consent.*

Under the restructuring measure effected by the Reconstruction and Renewal Byelaw 1995, certain "Incurred But Not [yet] Reported" ("IBNR") liabilities were moved off the balance sheet of Lloyd's and transferred to a newly created captive reinsurer (Equitas) that would thereafter act as a run-off claims workout manager (*i.e.*, managing the insolvency workout needed where an insurer goes into liquidation), thereby freeing Lloyd's agents to solicit new capital.

At the same time, Lloyd's Council appointed Additional Underwriting Agencies (No. 9) Ltd. ("AUA9") – a wholly-owned subsidiary of Lloyd's – to act as a substitute agent in place of all the managing agents of all of its syndicates so as to give the consent

required for a Reconstruction and Renewal ("R & R") reorganization for all of the then 36,000 Members of Lloyd's. This appointment was made under the authority of the Reconstruction and Renewal Byelaw and the Substitute Agents' Byelaw (which was issued in 1983 and authorized Lloyd's Council to appoint a "substitute managing agent" when the original agent managing a syndicate became unable to act for its investors and as to its insured policy-holders).

AUA9 then purported to execute an "R & R" Contract ("the Contract") "for and on behalf of" all Members, with two Lloyd's officers signing in the name of AUA9.

Under the Contract all Members became liable to pay a reinsurance premium to Lloyd's' wholly-owned reinsurer, Equitas, for the mandatory reinsurance that it was to provide them to cover what Lloyd's stated to be their future IBNR liability. In addition they were committed to acknowledging more than the next half-century's liability as due straightaway, waiving any defenses against any claim by Lloyd's against them. That liability was 80 years into the then-future under the terms of Equitas trust documents, which were not disclosed to them at the time, and remain unknown to almost all of them today.

This position was primarily a consequence of paragraph 5.10 of the Contract, which provided that:

> For the purposes of calculating the amount of any Name's [R & R] Premium ..., [Lloyd's] calculation ... shall be conclusive evidence ... in the absence of any manifest error" (the "conclusive evidence clause").

However, the Contract also had a no set-off provision in paragraph 5.5 which precluded any issues of credits being raised by way of defense to any R & R claim for payment that might be made by Lloyd's. A right to set-off would have enabled Members to reduce the quantum of a claim against them by, for example, the amount of Members' trust fund assets that Lloyd's had taken from their agents in the run-up to R & R but which Lloyd's never subtracted from their R & R liability in the subsequent R & R claim against the Members.

Many Members were not aware at the time either that such a "paper" Agent as AUA9 existed and was acting in their name for the purpose of executing the Contract or that the Contract even existed. They were certainly never asked to give their consent to its conclusion and only became aware of its existence afterwards, particularly when Lloyd's took steps to enforce its terms.

Nonetheless the validity of the Contract was upheld by the Court of Appeal on the basis that it saw AUA9 as an underwriting agent with the capacity to act for Members as a substitute agent despite the control exercised over it by Lloyd's.[5] This ruling meant that the Contract – unilaterally imposed through the legislative power conferred on Lloyd's – could then be used to override claims and defenses which Members might have against Lloyd's.

As a result Members could either (a) accept Lloyd's statement of their alleged projected liability

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[5] *Society of Lloyd's v Leighs* [1997] C.L.C. 1398 (C.A.).

for more than the next half-century (albeit without any supporting documentation on the numbers) and agree to a settlement with Lloyd's in which they would waive claims for restitution and pay some, but not all, of that liability or (b) if they did not agree to settle, be sued for their entire next 80 years' alleged future "debt" payable all at once as a current liability.

2. *The Unauthorized Restructuring Of The Members' Contracts With Lloyd's Was Excluded From Judicial Review As A Private Rather Than Public Function.*

Attempts to dispute the extent of this liability – which was not even imposed with any advance notice – foundered because neither judicial review nor remedies based on private law were available for this purpose. Although judicial review is available with respect to those functions exercised by Lloyd's that are seen as public law ones, its relationships with its Members in the system of self-regulation are not considered to be governmental[6] and thus the courts had already held that action taken by Lloyd's with respect to R & R was not subject to judicial review since the byelaws, as well as the measures taken under them, were considered as having been adopted in a private capacity – a matter of internal business functions – rather than in exercise of any public functions.[7]

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[6] *Doll-Steinberg v Lloyd's* [2002] EWHC 419 (Admin).

[7] See *Lloyd's v Levy & Ors* [2004] EWHC 1860 (Comm), and *R on the application of West v. Lloyd's of London* [2004] EWCA 506 (Civ)., [2004] 3 All ER 251.

Even if such a ruling might seem questionable given the essentially legislative functions involved in issuing byelaws, it necessarily implied that private law proceedings should be the appropriate means of resolving any dispute about the basis on which the liability had been imposed, as in the unsuccessful proceedings already noted to dispute the use made by Lloyd's of the Substitute Agents Byelaw 1983 to appoint a wholly-owned substitute managing agent to conclude the Contract without the knowledge of the Members who became bound by it.

B. Private Law Remedies Were Equally Unavailing Due To The Exculpatory Provisions In The Byelaws And The Incursion Of The Immunity Doctrine Into Private Law.

Attempts to use private law remedies – whether by way of defense to claims brought against Members or by way of proceedings instituted by them against Lloyd's – have also been blocked, partly because of the terms of the Contract issued by Lloyd's in reliance on two byelaws and partly through reliance on the immunity conferred by section 14(3) of the 1982 Act.

Thus the conclusive evidence clause in the Contract was relied upon by both the Commercial Court[8] and the Court of Appeal (Civil Division)[9] as the basis for deeming that defenses to liability – both as to the alleged future debt itself and as to material

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[8] *Lloyd's v. Tropp* [2004] EWHC 1397 (Comm).

[9] *Tropp v. Lloyd's* [2004] EWCA 1544 (Civ).

or even willful error in its quantum – were precluded from argument.

As the Contract and the conclusive evidence provision in it were regarded as a valid exercise of the powers conferred on Lloyd's, the only possibility of overcoming the conclusive evidence clause considered by the courts to be open to Members would have been through showing arguable error on the face of the numbers given to the court by Lloyd's. However, this possibility could be of no assistance when the problem was not a mistake in calculation but the very basis on they had been compiled. Thus fresh evidence – pointing to losses having been wrongly attributed by Lloyd's to Members – could not be adduced to challenge the correctness of fact of those numbers.

Although the preclusion of the defenses that the petitioner wished to raise might seem an inevitable consequence of the terms of paragraph 5.10 of the Contract to which Members were ostensibly parties, it is a remarkable interference with the property rights of this individual – and indeed those of all Members of Lloyd's – for an entity to be empowered by Parliament with the capacity to compel participation in a contract on such terms when the persons affected have not even had an opportunity first to discuss the proposed measure effecting the contract with the entity concerned, particularly given their membership of it, or any effective notification of the provisions adopted before the execution of them was actually sought.

Even a Member's counter-claim against Lloyd's for damages for libel, slander and malicious prosecution or falsehood, pursuant to the defamation

exception expressly allowed by section 14(5) of the 1982 Act to the immunity from duties and liability in section 14(3), fell victim to the conclusive evidence provision in the Contract. This was on the basis that that provision required that any defamatory statements by Lloyd's as to the petitioner, even when made maliciously in the claim brought by Lloyd's, were to be deemed irrefutably "true" in law irrespective of their truth or otherwise in fact.[10]

Furthermore the suggestion by the Commercial Court and the Court of Appeal that certain counterclaims – suggesting that the liability arose out of inevitabilities (*i.e.*, losses that were known to have already occurred at the time of entering into an insurance contract) rather than fortuities (i.e., risks or losses which may or may not happen and thus constitute true insurance business[11]) – might be brought as new claims in a separate proceeding proved to be an entirely illusory option since such proceedings were subsequently found also to be precluded, this time by virtue of the immunity conferred by section 14(3) of the 1982 Act.

The immunity conferred by section 14(3) was held to be effective – while recognizing that Lloyd's "is not a public body, is not amenable to judicial review and is not amenable to the Human Rights Act" – because Lloyd's was performing regulatory

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[10] *Tropp v. Lloyd's* [2004] EWCA 1544, (Civ) para 20.

[11] *Ikerigi Cia Naviera SA v Palmer, The Wondrous* [1992] 2 Lloyd's Rep. 566 and *Manifest Shipping Co. Ltd. v. Uni-Polaris Shipping Co. Ltd.* [2001] UKHL 1.

functions,[12] although the acts at issue were taken in its private capacity under contractual authority rather than in exercise of public functions conferred by statute. Furthermore it was applied notwithstanding that Lloyd's when bringing proceedings to enforce the liabilities imposed by the Contract on Members was only acting as an assignee of Equitas which was clearly not exercising any regulatory function. This seems a particularly remarkable conclusion given that the issue in dispute was not the appropriate conduct of a Member in the handling of insurance business under his or her original contract on joining Lloyd's but the extent of the liability that could legitimately be imposed upon him through a second contract to whose terms he had not consented in his original contract 9 years earlier, and which had not been disclosed to him at that time when he was being induced to consent to the original contract.

The House of Lords refused to grant the petitioner leave to appeal the decision.

It should also be noted that even a claim for fraud in matters connected to the Contract cannot be brought. This is firstly because a fraud defense to an R & R claim would be considered to be precluded by the no set-off clause in paragraph 5.5 of the Contract.[13] Secondly, all affirmative fraud claims were held to be barred as a result of a case management order affecting all Members – and not

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[12] *The Society of Lloyd's v. Tropp* [2006] EWCA Civ 88, 23 January 2006, para. 22.

[13] *Society of Lloyd's v Leighs* [1997] C.L.C. 1398 (C.A.).

just those party to the proceedings in which it was made – notwithstanding that those claims might arise from facts occurring later than those in the case concerned and that they had not been pleaded or considered in the court making that order.[14] This was all the more significant as the exception to the immunity for bad faith has been treated narrowly, when applied to Lloyd's in particular, as equivalent only to affirmative fraud and not capable of embracing deliberate avoidance on the its part.[15]

C. The Current Situation Is The Result Of A Series Of Judicial Decisions Misapprehending The Intent Of Parliament.

The present position seems very far from the one that Parliament envisaged would ensue when enacting the 1982 Act. Thus the Under-Secretary of State for Trade, Mr. Reginald Eyre stated that the provision which became section 14(3):

> protects Lloyd's only against damages. It by no means rules out the process of judicial review of Lloyd's discharge of its regulatory duties. Where it is thought ... that [Lloyd's management] have exceeded their powers, failed to carry out their duties, or exercised them in an unfair or unreasonable manner, it would be open to aggrieved parties to seek judicial review by the High Court. A

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[14] *Laws v. Lloyd's* [2003] EWCA 1887, (Civ), para. 65(i) and 65(xii).

[15] *Tropp v. Lloyd's* [2004] EWCA 1544, (Civ), para 18.

> successful action could lead to an injunction or a declaration. ... I believe that this is a most important safeguard. The authorities at Lloyd's will be accountable in court for the fairness and reasonableness of what they do or omit to do.[16]

Similarly Nicholas Lyell QC, following a modification to the provision that became section 14(3), observed that:

> As a result of the change, one of the [members of the Lloyd's community] who feels himself unjustly treated ... can now go to the court for an injunction or a declaration .... [I]f injustice can be shown to have been done, there is a swift remedy. That is absolutely right. It is the kind of protection which they [the members] need.[17]

Furthermore Lord Mackay of Clashfern, the Lord Advocate, speaking for the Department of Trade subsequently stated that:

> ... it is right that the [Lloyd's] authorities' interpretation of their statutory functions [under the bill] should be open to scrutiny by the courts. Judicial review will be available as a remedy for oppressive or unfair acts, and nothing in the Bill affects that ... it is quite

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[16] Hansard, HC proceedings, 3 February 1982, cols 393-396H.

[17] Hansard, HC proceedings, 22 February 1982, col 397.

wrong to suggest that the Bill would put Lloyd's above the law.[18]

However, although the immunity in section 14(3) of the 1982 Act was understandably intended to provide a shield for Lloyd's in its capacity as statutory regulator when performing its public functions under the 1982 Act, it is now being used to protect acts of an essentially private character that impose substantive liabilities on its internal community of an extremely onerous character, tantamount to a lifelong indenture.

The attribution by the courts of this character to the immunity in section 14(3) can also be seen in the ruling in *Laws v. Society of Lloyd's*,[19] a case in which an attempt was made to challenge the immunity through reliance on the Human Rights Act 1998. However, Waller L.J. rejected the reliance upon the Human Rights Act 1998 – even if were applicable – on the basis, *inter alia*, that section 14 of the 1982 Act did not engage any remedy through the fair hearing or due process guarantee in Article 6 of the Convention[20] because it was not a mere procedural

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[18] Hansard, HL proceedings, 1 April 1982, col 1530.

[19] [2003] EWCA 1887, (Civ), unreported.

[20] Article 6 provides that: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the

bar (*i.e.*, it was not a barrier to the bringing of proceedings in respect of a wide range of matters) but conferred a substantive immunity, in the sense of preventing rights and liability in respect of them from even arising.

Furthermore there is no safeguard that the international human rights standards that the United Kingdom has made a part of its constitutional framework will be respected where substantive obligations are being imposed on Members by Lloyd's pursuant to the extensive powers conferred by the 1982 Act since it has also been held that there could be neither judicial review of its functions nor any relief under the Human Rights Act 1998. The latter conclusion was based on a finding that the Society of Lloyd's was not a public authority for the purposes of the Human Rights Act 1998 and its objectives were commercial[21] so the prerequisite of public (or state) action for applying that Act did not exist. There is, therefore, a serious risk that Lloyd's will exercise the powers conferred on it in a way that unjustifiably interferes with the right of Members to the peaceful enjoyment of their possessions (*i.e.*, their right to the protection of their property) under Article 1 of the

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extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 6(1), 213 U.N.T.S. 221, Europ. T.S. No. 5.

[21] *R on the application of West v. Lloyd's of London* [2004] EWCA 506 (Civ), [2004] 3 All ER 251.

First Protocol to the European Convention on Human Rights.[22]

Thus, notwithstanding that the intention of Parliament when adopting the 1982 Act was always that acts by Lloyd's in the exercise of its public functions should be subject to judicial review and its private law acts would be subject to private law procedures, the experience has shown that neither is possible so that Lloyd's and its management are not accountable however a function is classified.

English courts have frustrated the intention of Parliament and effectively undermined the rule of law in the relationship between Lloyd's and Members through an over-expansive interpretation of the immunity conferred by the 1982 Act and a failure to distinguish between the performance by Lloyd's of genuine public regulatory functions and the protection of its own commercial interests at the expense of those of its Members.

As a result the management of Lloyd's are not only free to determine the substantive rights and

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[22] Article 1 of the First Protocol provides that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Art. 1, 213 U.N.T.S 262, Europ. T.S. No. 9.

obligations of its individual Members but they are also protected from any rigorous scrutiny of factual issues underpinning both claims brought against it and defenses raised against claims which it brings itself. Such a situation not only runs counter to the interests of their principals - the Members - but also of both policy-holders and the public in protecting the market as a whole, as well as operating as a deterrent to potential fiduciary investors. It is also incompatible with the fundamental right of access to court.

Although it is undoubtedly possible to continue to raise objections to the correctness of both the restrictive approach to judicial review of measures taken in respect of Members and the breadth given to the immunity in section 14(3) of the 1982 Act, it is evident that the positions taken on these matters by the English courts have become settled law and thus binding so long as the 1982 Act remains in force.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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